BM.345.1-055

It follows from what has been said above that although the Native Commissioner rightly refused the application to amend the chief's record this in itself did not entitle him to dismiss the appeal against the actual judgment of the chief wihout more ado as it was still open to the defendant at that stage to restate his defence in accordance with the provisions of rule 12. The appeal itself was in any case not before the Native Commissioner's court at that stage as the application for condonation of its late noting had not yet been heard and adjudicated on.

The appeal in respect of the Native Commissioner's refusal to amend the chief's record is therefore dismissed but the appeal in respect of the dismissal of the appeal against the judgment of the chief is allowed and the case is remitted back to the court of the Native Commissioner to enable the defendant to take such further action as he may be advised. If the matter should come to trial again it should be heard by another Native Commissioner in view of the fact that the one who presided at the trial has already expressed the view that the defendant admitted liability to the claim.

It would appear from the record that neither party was responsible for the dismissal of the appeal against the chief's judgment by the Native Commissioner and that in doing so he acted *mero motu*. For this reason it will be ordered that the costs of appeal be costs in the cause.

Craig and Colenbrander, Members, concur.

For Appellant: Mr. S. H. Brien instructed by A. C. Bestall & Uys.

For Respondent: Mr. H. H. Kent.

REPORTS

OF THE

BANTU APPEAL COURTS

1963 (1 & 2)

VERSLAE

VAN DIE

BANTOE-APPÈLHOWE

THE GOVERNMENT PRINTER, PRETORIA
DIE STAATSDRUKKER, PRETORIA
G.P.-S.4499752—1963-64—700.

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NORTH-EASTERN BANTU APPEAL COURT.

KANYILE vs. NGEMA.

B.A.C. CASE No. 40 OF 1962.

ESHOWE: 28th November, 1962. Before Craig, Acting President; Parsons and Colenbrander, Members of the Court.

PRACTICE AND PROCEDURE.

Bona fides of a party—variation of pleadings—failure to call witnesses present—failure to ensure presence of another witness despite postponement—refusal by court to grant further postponement.

Summary: Plaintiff sued defendant for the return of a beast or its value allegedly misappropriated. Defendant's tactics were clearly obstructive. He did not give evidence or call witnesses though one was present and he had ample time to ensure the presence of the other. His application for a further postponement was refused and without further ado he closed his case without acceptable evidence.

Held: That the Bantu Affairs Commissioner was justified in refusing the application for a further postponement and that the appeal on that ground should fail.

Held further: That there was no merit in the other grounds of appeal.

Cases referred to:

R. versus Bikitsha, 1960(4), S.A.L.R. 181.
R. versus Zackey, 1945, A.D., 505 at 513.

Appeal from Judgment of the Bantu Affairs Commissioner at Melmoth.

Craig, Acting President:

Plaintiff sued defendant in the Bantu Affairs Commissioner's Court for the return of a certain red bullock or its value R40. A default judgment was granted against defendant on 20th April, 1961, and it was rescinded on 24th August, 1961, whereafter the trial proceeded.

The Bantu Affairs Commissioner gave judgment on 13th October, 1961, "for plaintiff for return of one red bullock by defendant or its value R40 and costs of action."

Defendant has lodged an appeal to this court on the following grounds:—

1. The learned Presiding Officer erred both in law and on fact on holding that the bullock in question has been sufficiently identified by plaintiff and his witness to establish its ownership.
2. The learned Presiding Officer misdirected himself on the question of onus, and such misdirection was prejudicial to the defendant.
3. The learned Presiding Officer erred in refusing defendant's application for postponement in order to call his witness, Ngubeni Dumisa, on the vital question of correctness, or otherwise, of plaintiff's identification of the beast claimed, and such refusal was prejudicial to the defendant.
4. The learned Presiding Officer erred in assessing in advance the evidential value of Ngubeni Dumisa whom the defence, sought but unsuccessfully applied be called.
5. The Court should have held that, having due regard to the question of onus, plaintiff and his witness were unreliable and unsatisfactory and that plaintiff had not discharged the onus which, in law, rested on him.

Plaintiff gave evidence testifying to his ownership of the bullock in question and produced two witnesses who actually saw defendant removing it.

In his plea defendant impliedly admits taking the beast but suggests that it is the property of his father. He did not give evidence at the trial nor did his father. He called one witness Mnyeseni Dumisa, whose evidence proved to be founded on hearsay. An application by defendant's attorney for a postponement to call as a witness Ngubeni Dumisa whom he had already stated he was not calling was refused by the Commissioner. Without further ado defendant closed his case.

I can find little merit in grounds of appeal 1, 2, 4 and 5 nor in the arguments advanced in support of them and the appeal on those grounds fails.

Ground 3 is properly a matter for review but defendant's counsel was allowed to argue it as if it were a good ground of appeal as was done in *R. versus Bikitsha,* 1960, (4) S.A.L.R. 181.

Plaintiff gave evidence on 24th August, 1961, *inter alia* that he had bought the mother of the beast in dispute from Ngubeni Dumisa. This evidence must have made it apparent to defendant that he must call the latter to testify on the point. Later the case was postponed to 26th September, 1961, on which date Johan Biyela testified whereafter plaintiff closed his case.

Then defendant adopted the procedure set out earlier in this judgment. He had ample time from 24th August, 1961, to 26th September, 1961, to ensure the attendance of Ngubeni Dumisa by means of subpoena but took no such step. The reason tendered for non-appearance of Ngubeni is that he had to go to Empangeni to see his attorney about his case. I find it strange that an explanation should be advanced when there was no intention of calling him.

The defendant's bona fides are open to grave doubt. In his affidavit supporting his application for rescission he states he has a good defence in that he is a minor, has no *locus standi in judicio,* was not duly assisted by his guardian, that he acted as "mandatarius" for his father and that the beast in dispute belongs to his father. In his plea he merely states his father lost a bullock, sent him to look for it and he found it with plaintiff's brand on it. He did not produce one title of evidence to support what he alleged. My opinion is that his tactics in this matter were purely obstructive.

In the case of *Rex versus Zackey,* 1945, A.D. 505, at page 513, in which application was made for an adjournment though not on grounds akin to those in the instant case, Greenberg J. A. said:—

> "In the face of an attitude of this kind, *which reasonably gives rise to a strong suspicion as to the appellant's bona fides* (the underlining is mine), I am indeed far from certain that I would have granted the application had I been the Magistrate but even if I were certain this in itself would not justify an interference with his decision which can only be upset if he has not exercised a judicial discretion. 'Judical discretion' has been referred to in a large number of cases but I propose to quote only two. In *re* Taylor (4th Edition 157), Jessell, M.R., said that it was a discretion 'to be exercised on judicial grounds, not capriciously but for substantial reasons'. The next quotation is from *Tripp versus Gibbon & Co.* (1913, A.D. 354), which will not be repeated in extenso here but the gist of which is that if the judicial officer takes into consideration the circumstances of the case, the various issues, the conduct of the parties and 'brings his unbiased judgment to bear on the matter and does not act capriciously or upon any wrong principle, I know of no right on the part of court of appeal to interfere with the honest exercise of his discretion'."

In my opinion the application for a postponement was rightly refused and this ground of appeal (No. 3) must also fail. The appeal is dismissed, with costs.

Parsons, Member:

I concur. Defendant without any lawful authority took plaintiff's beast. If it were his or his father's it could and should have been claimed in a proper manner. Defendant or his father should have sued the plaintiff and taken on the burden of proving ownership. Plaintiff could have recovered possession by applying for a spoliation order. But he was not obliged to do so. Because he did not take that course and proceeded by way of summons instead, the defendant gained the further advantage that the plaintiff had to prove that the beast was his.

The plaintiff adduced sufficient evidence to establish *prima facie* that he was the owner of the beast, having purchased its mother from one Ngubeni Dumisa. That evidence was recorded on 24th August, 1961.

The defendant stated in his affidavit in support of his application for rescission of the default judgment that he had a good defence to plaintiff's action, viz.—

(i) that he was a minor with no *locus standi in judicio* and was not duly assisted by his father;

(ii) that he had merely acted on his father's instructions, and he had told the plaintiff so;

(iii) and that the beast in dispute belonged to his father.

On 26th September, 1961, the defendant and his father were both in court and could have given evidence in support of those contentions. Normally Bantu litigants are most eager to have their say in court. As defendant and his father were not called to give evidence it would seem that, notwithstanding the above stated grounds, the defence intended to rely upon an attack on the credibility of the plaintiff and his witnesses.

That being so, it is surprising that Ngubeni Dumisa was not subpoenaed and more surprising that the Attorney for the defence, when plainly asked whether he was calling Ngubeni Dumisa to testify that he did not sell a beast to plaintiff, answered " No ".

When Ngubeni was found not to be available on 26th September, 1961, when the hearing was resumed, it was still open to defendant to lead evidence which was then at hand, in order to substantiate his alleged grounds of defence to plaintiff's action.

Plaintiff put the question of ownership in issue at the start and he established a credible *prima facie* case to support his claim. Defendant it would seem could have done something positive to rebut it but neglected to do so.

In all the circumstances the refusal of the Bantu Affairs Commissioner to grant a further postponement on 26th September, 1961, does not appear to be unreasonable and there is in my view no justification for interfering with the conclusion reached in the court below.

Colenbrander, Member: I concur.

For Appellant: Mr. R. A. V. Ngcobo (R. A. V. Ngcobo).

For Respondent: Mr. F. P. Behrmann (H. H. Kent and J. G. Barnes).

NORTH-EASTERN BANTU APPEAL COURT.

MAGUBANE vs. NZIMANDE AND ANOTHER.

B.A.C. CASE No. 33 OF 1962.

PIETERMARITZBURG: 11th September, 1962. Before Cowan, President; Craig and Botha, Members of the Court.

PRACTICE AND PROCEDURE.

Pleadings—criterion in Chief's court is Chief's written record—presumption of correctness—whether judgment executable.

Summary: Plaintiff sued for damages for wrongful attachment of cattle.

Execution on four head of cattle was levied on a Chief's judgment. The claim was for doors, boxes, plough, pots, beans and corn and the Chief's written record of judgment was "The defendant is advised to collect all the things mentioned above from the people that took them. Defendant must pay the Plaintiff £1. 4s. 6d., costs".

Held: That the criterion in so far as the pleadings and judgment in the Chief's court are concerned is the Chief's written record.

Held further: That the correctness of the judgment as recorded must, therefore, be presumed and can only be challenged by following the procedure laid down in the case of *Kunene versus Madonda,* 1955, N.A.C. 75.

Held further: That the judgment as recorded could not support the execution levied on it.

Regulations referred to:

No. 6 of Government Notice No. 2885 of 1951.

Cases referred to:

Malufahla versus Kalankomo, 1955, N.A.C. 95.
Kunene versus Madonda, 1955, N.A.C. 75.

Appeal from judgment of the Bantu Affairs Commissioner at Bulwer.

Cowan. President:

The appellant in this court was the guardian of the second respondent. The first respondent is the tribal messenger of a Chief's court.

The second respondent had sued the appellant in the Chief's court for 3 doors, 2 boxes, plough, 6 pots, 2 full sacks of beans and 12 bundles of corn which he alleged the appellant had taken to look after. He alleged that these articles had been taken by the appellant at the time when he was in charge of the kraal of the second respondent's father who had died. The appellant's defence to this claim was a denial that he had taken "all these things mentioned above. I only know mealies that I paid your father's debts. The other things were sold by your father when he was still living". According to the written record, which was signed by the Chief himself and by two members of the court, the court gave judgment on the 19th September, 1958, in the following terms:—

"The defendant is advised to collect all the things mentioned above from the people that took them. Defendant must pay the plaintiff £1. 4s. 6d. costs."

It is common cause that, as a result of this judgment, four head of cattle belonging to the appellant were attached by the first respondent and handed over by him to the second respondent.

The appellant then brought an action against the two respondents in the court of the Bantu Affairs Commissioner alleging that this attachment was wrongful and unlawful and claiming the return of these four head of cattle or their value amounting in all to £110. A default judgment was taken against both the respondents but this judgment was subsequently rescinded on application and the matter went to trial on the 9th April, 1962. In the interim the appellant had given notice that he would apply to amend his summons by, in effect, increasing the claim to one for the return of six head of cattle or their collective value of £130 as the animals which had been attached had had increase of two heifers subsequent to the attachment which he valued at £10 each. He also added an alternative claim to the effect, briefly, that if the court found that the attachment was legal and valid then the first respondent had recklessly, wrongfully and wilfully over-attached goods on the writ of execution as a result of which he had suffered damages in an amount of R50 being the loss of use and enjoyment of the cattle over-attached. He averred further that the second respondent had been unjustly enriched at the expense of the plaintiff and claimed the return (by the second respondent) of the over-attached cattle or their value. His prayer in respect of this alternative claim was as follows:—

(*a*) *As against first defendant:* (1) Judgment for R50.

(*b*) *As against second defendant:* (1) Return of the cattle aforesaid.

(*c*) *As against first and second defendants jointly and severally:* (1) Alternative relief. (2) Cost of suit.

While admitting that he had attached the four head of cattle, the first respondent denied in his plea that this attachment was wrongful or unlawful and submitted that it was lawfully made under a valid judgment of the Chief and that he had followed the laws and customs of the tribe to which he and the parties belonged. He went on to aver that he had given the appellant a reasonable time in which to pay the debt and release the cattle but that the latter had failed to do this and that in accordance with the custom of the tribe he had handed the cattle to the execution creditor, i.e. the second respondent. His plea to the alternative claim was a denial that he had recklessly, wrongfully and wilfully over-attached goods. He went on to deny that the appellant had suffered any damage and averred that in all matters he had acted lawfully in terms of the custom of the tribe and denied that the second respondent had been unjustly enriched. The second respondent admitted that the four head of cattle had been attached and delivered to him and admitted the subsequent birth of the two calves. He denied that the attachment was wrongful and unlawful and maintained that by the custom of the tribe they became his property upon delivery to him by the first respondent. He pleaded further that as far as he was concerned, "the subject of these cattle was disposed of under Case No. 18/1960 and judgment was given in his favour and that accordingly the claim now made is *res judicata*". In regard to the alternative claim he denied that he had been unjustly enriched at the expense of the appellant and pleaded that the four head of cattle were lawfully handed to him by the messenger and that, according to the custom of the tribe ownership vested in him upon delivery to him.

The Bantu Affairs Commissioner found, *inter alia,* that although according to the written record of the Chief the appellant was only advised to collect all the things mentioned in the summons from the people that took them, the judgment was in fact that if he could not return the articles he should pay their value R40; that on this judgment the first respondent had attached the four

head of cattle and delivered them to the defendant; that according to the custom of the tribe cattle are handed over to the judgment creditor and not sold and that the cattle had not been wrongfully and unlawfully attached by the first respondent. He gave judgment for the defendants on both the main and the alternative claim with costs.

The matter now comes before this court on appeal on the following grounds:—

1. The learned Native Commissioner erred in holding that the onus lay upon the plaintiff, and should have held that the onus lay on both defendants, in that both defendants admitted the attachment of the cattle in question, but averred the legality of such action.
2. The learned Native Commissioner erred in holding that the defendants had established, in fact, the existence of an alleged tribal custom which enabled the first defendant to attach and value such attached cattle arbitrarily at R10 per head, and to deliver such cattle on the hoof to the execution creditor valued at such figure.
3. The learned Native Commissioner should have found that the original Chief's judgment did not authorise the execution issued thereon by the second defendant, and executed by the first defendant; in that the Chief's judgment was a mere directive to the plaintiff to endeavour to recover the missing articles from the person who removed them; and could not, as such, be executed upon.

   Alternative to Paragraph (3).

   The learned Native Commissioner should have accepted the unrebutted evidence that the second defendant had, in fact, disposed of one of the attached cattle for the amount of the alleged judgment debt of R40, and he should therefore, have found that the first defendant had over-attached and therefore given judgment for plaintiff for the return of the remaining three head of cattle and their progeny.
4. The learned Native Commissioner, on all the facts adduced before him, coupled with the fact that the second defendant elected not to give evidence, should have found—
   (*a*) that the second defendant had, in fact, been unjustly enriched to the extent of 3 head of cattle and their progeny and should therefore have found for plaintiff in this amount;
   (*b*) that the attachment by the first defendant was unlawful and had caused plaintiff to suffer damages in the amount claimed.

The first ground of appeal has reference to a ruling given by the Bantu Affairs Commissioner at the commencement of the trial as to the party on whom the burden of proof rested. It would appear from the record that the appellant's attorney contended that as the respondents had admitted the attachment of the four cattle the onus was on them to prove that the attachment was lawfully effected. This contention was rejected by the Bantu Affairs Commissioner who ruled that the onus to commence lay on the plaintiff. Mr. Kriek who appeared for the appellant indicated that he did not propose to argue this ground of appeal and this court finds it unnecessary to deal with it.

It will be convenient to deal first with Ground 3 of the notice of appeal which was the one on which Mr. Kriek first addressed the court. In finding that the judgment of the chief was, in fact, that if the appellant could not return the articles in question he should pay their value R40, the Bantu Affairs Commissioner relied entirely on the evidence to this effect given by the chief himself and rejected that of the plaintiff who had denied that the chief had ordered him to pay R40 if he could not produce the articles.

In the view of this court, the Bantu Affairs Commissioner erred in deciding this action on the basis that the judgment of the chief's court was the judgment which the chief said in evidence he had given. In the case of *Malufahla versus Kalankomo*, 1955, N.A.C. 95 it was laid down that "the criterion in so far as the pleadings and judgment in a chief's court are concerned is the chief's written record . . . ." and this court with respect, adopts that ruling. Regulation 6 of Chiefs' and Headmen's Civil Court rules requires a chief to prepare or cause to be prepared a written judgment immediately after pronouncement of judgment and the maxim "*omnia praesumuntur rite esse acta*" applies to the preparation of such a record. The correctness of the judgment as recorded must, therefore, be presumed and can only be challenged by following the procedure laid down in the case of *Kunene versus Madonda*, 1955, N.A.C. 75.

The judgment of the chief as recorded could clearly not support the execution levied on it as it was, at most, merely a direction to the appellant to restore the articles in dispute and provided no sanction in the event of his failure to do so.

In so far as the second respondent is concerned the appeal must succeed on this ground and it is unnecessary to consider the remaining grounds.

Mr. Kriek did not press the appeal in respect of the claim for damages against the first respondent as he conceded, in our view rightly, that he had not acted maliciously in attaching the cattle.

In the result the appeal against the judgment in respect of the first respondent is dismissed with costs. The appeal in respect of the judgment for the second respondent is allowed with costs and the judgment of the Bantu Affairs Commissioner is altered to read "For plaintiff for three of the four head of cattle attached and their two progeny plus the fourth beast attached or its value R40 with costs".

Craig and Botha, Members, concur.

For Appellant: Adv. J. J. Kriek. (J. R. N. Swain & Co.)

For Respondent: Adv. J. H. Niehaus. (H. L. Bulcock.)

SOUTHERN BANTU APPEAL COURT.

SOLANI vs. NYAMFU.

N.C.A. CASE No. 13 OF 1962.

KING WILLIAM'S TOWN: 29th October, 1962. Before Yates, Acting President, Muir and Grant, Members of the Court.

MUNICIPAL NATIVE LOCATIONS.

Purchaser of improvements on hutsite in municipal native location—attempt to circumvent clause in relevant regulations by having property registered in name of third party—illegal and contrary to public policy.

Summary: Plaintiff (now respondent) sued defendant (present appellant) for a declaration that the improvements on a hutsite in the East London Municipal Native Location were his property and that he or his wife be entitled to have the improvements and the lease in respect of the hutsite transferred to one of their names; payment of the sum of

£304 10s., being arrear rental; payment of any additional amount of rental that would accrue between the 1st February, 1961, and the date of judgment; alternative relief and costs of suit. In his particulars of claim the plaintiff averred that he had bought certain improvements on a hutsite in the East London Municipal Native Location but that as the relevant municipal regulations prohibited him from acquiring property in the said location, as he was not resident there, he arranged for the property to be registered in the name of the defendant who was responsible for the collection of rentals from the tenants and for accounting for the said rentals to the plaintiff; that at the time of issue of his summons the defendant was indebted to him in the amount of £304 10s., in respect of arrear rentals which defendant despite demand neglected to pay to him (plaintiff).

The Bantu Affairs Commissioner gave judgment for plaintiff for R900, with costs.

The defendant appealed to this Court.

Held: That as the agreement between the parties to register the property in defendant's name was illegal and entered into with intent to circumvent the location regulations of the East London Municipality, in that plaintiff did not fall within the category of persons specified in the regulations as being entitled to acquire property in the location, it was clearly in *fraudem legis* and contrary to public policy as expressed in the regulations.

Held further: That the dictum in the case of *Jajbhay versus Cassim,* 1939, A.D., at pages 550 and 558, viz., "Courts will discourage illegal transactions but the exceptions show that where it is necessary to prevent injustice or to promote public policy it will not rigidly enforce the general rule" was not apposite here as it was clearly in the public interest that such illegal contracts should be suppressed and no good ground had been advanced why the general rule should be departed from.

Cases referred to:

Jajbhay versus Cassim, 1939, A.D. 539, at pages 550 and 558.

York Estates Ltd., versus Wareham, 1950, (1) S.A. (S.R.) 125, at Page 128.

Bobrow versus Meyerowitz, 1947, (2) S.A. (T.P.D.) 885, at page 891.

Kolisi versus Kolisi, 1941, N.A.C. (C. & O.) 68.

Mabote versus Thaele, 1938, N.A.C. (C. & O.) 47.

Singama versus Jeyi, 1916, E.D.L.D. 444.

Jones' and Buckles' Civil Practice in Magistrates' Courts in South Africa (Sixth Edition), at pages 392 to 393.

Beck's Pleadings in Civil Actions (Second Edition), at pages 46 to 47.

Appeal from Court of Bantu Affairs Commissioner, East London.

Yates (Acting President):

This is an appeal from the Court of a Bantu Affairs Commissioner in which plaintiff (present respondent) sued defendant (present appellant) for—

"(*a*) A declaration that the improvements to Hutsite 1349, Mbola Street, Duncan Village, East London, are his property and that he or his wife be entitled to have the improvements and the Lease in respect of the Hutsite transferred to one of their names;

(*b*) payment of the sum of £304 10s.;

(*c*) payment of any additional amount of rental that accrues between the 1st February, 1961, and the date of judgment;

(*d*) alternative Relief;

(*e*) costs of suit,"

averring in his particulars of claim that—

" 1. both parties hereto are Natives as defined by Act 38 of 1927;

2. during or about 1957 plaintiff purchased the improvements on hutsite 1349, Mbola Street, Duncan Village, East London, from Attorney Schneider, the Agent for the owner, for the sum of £585;

3. as plaintiff or his wife were not qualified to have the hutsite improvements registered in their name in terms of the East London Municipal Location Regulations, plaintiff appointed Zamile Willie Solani (*alias* Vuyelelo) as his substitute of the property and the property was accordingly registered for the sake of convenience only in the name of the said substitute who is the defendant;

4. Defendant collected rental from the tenants and accounted to plaintiff at the end of each month when plaintiff called at East London for this purpose, up and until the end of March, 1959;

5. the total amount of rental collected each month from the tenants is £14 10s.;

6. since April, 1959, to date, defendant has not accounted to plaintiff despite demand and in the premises plaintiff claims to be entitled to payment of the rental from the defendant in the sum of £304 10s.;

7. despite demand that defendant sign the necessary papers to transfer the hutsite into plaintiff or his wife's name, defendant either neglect and/or refuses to do so."

Defendant pleaded as follows:—

" 1. Paragraph 1 is admitted.

2. Paragraph 2 is denied and plaintiff is put to the proof thereof. Defendant states that the property in question was purchased by him from Attorney Schneider on the 7th August, 1957, for the sum of £450.

3. Paragraph 3 is denied and plaintiff is put to the proof thereof. Defendant specifically denies that he was ever appointed substitute and states that the property was duly transferred to him pursuant to a valid contract of sale between himself and the then owner of the property.

4. Defendant denies all the allegations contained in paragraph 4 and puts plaintiff to the proof thereof.

5. Paragraph 5 is denied and plaintiff is put to the proof thereof.

6. With reference to paragraph 6, defendant states that he has never, at any time, accounted to plaintiff or to any other person, and in any event, defendant denies that plaintiff is entitled to any account and puts him to the proof thereof. In the premises, defendant denies that he is indebted to plaintiff either in the amount claimed or any other amount, and puts plaintiff to the proof thereof.

7. Defendant admits that he has refused, and that he still refuses, to sign transfer papers, by reason of the fact that the property in question is his property and plaintiff is not entitled to claim same."

The Bantu Affairs Commissioner gave judgment for plaintiff for R900, with costs, and against this judgment an appeal is brought on the grounds—

" 1. That the Assistant Bantu Affairs Commissioner erred in accepting the evidence of the plaintiff that he was the purchaser of the Hut site in question in preference to the Defendant's evidence which is supported by documentary evidence.

2. That in any event, even if the Assistant Bantu Affairs Commissioner accepted that plaintiff was the purchaser and that there was an agreement with defendant to take transfer, the judgment is bad in law, in that it having been found on the evidence and on plaintiff's admission that such agreement was illigal and a deliberate violation of the law the plaintiff was not entitled to any relief from a Court of law upon the said agreement.

3. That further the judgment is bad in law in that as the plaintiff's action was for specific performance *ex contractu*, the Assistant Bantu Affairs Commissioner could not on the pleadings as they stood properly give a judgment based on unjust enrichment.

4. That the judgment based on the alleged unjust enrichment could not be justified by the prayer for alternative relief on the ground that such prayer did not envisage a judgment not supported by the factual allegations in the summons.

5. That generally the judgment is against the weight of evidence and probabilities of the case more particularly in that the mere fact of plaintiff's age, " unsteadiness " and " infirmity " was not sufficient to swing the preponderance of probabilities in his favour having regard to the evidence as a whole."

In view of the nature of the defence the onus was on plaintiff to prove that he had purchased the property and the Commissioner accepted his evidence and that of his witnesses to that effect. Plaintiff's evidence was strongly attacked by Mr. Popo, who appeared on behalf of the appellant, and it is clear that he (plaintiff) was a most unreliable witness. The Commissioner in his reasons for judgment refers to a major discrepancy in his evidence in regard to the amount paid for the property, for whereas plaintiff maintained that he had bought it for £580, the evidence of the attorney's clerk, Dumakude, supported as it is by the receipts produced make it clear that the price paid was £450. Plaintiff's evidence as to the initial payment and subsequent instalments is also at variance with that of his witnesses for whereas he maintained he first paid £180 and subsequent instalments of £100 each, Dumakude's evidence supported by the receipts, proved that the first instalment was £200 followed by the payment of several instalments of varying amounts. Again plaintiff's evidence in regard to the rentals charged for the rooms was quite unreliable and he was unable to explain how the monthly amount of £14 10s., as specified in his summons, was made up nor was he able to furnish any details of payments of rents made to him by the defendant. Further, whereas he first stated in his evidence that the property had ten rooms and that two more were added, he admitted later in his evidence that there were now only nine rooms. The Commissioner apparently did not consider these discrepancies to be important for he considered that plaintiff's old age and general infirmity excused them but, in my opinion, while it cannot be said that he was deliberately lying yet the discrepancies are sufficiently serious as to make his evidence totally unacceptable.

However, the evidence of the other witnesses on behalf of the plaintiff support the Commissioner's finding that plaintiff did buy the property. Harry Martin, the prior owner, has given evidence that he sold the house to plaintiff. According to him defendant

approached him and arranged the sale on behalf of plaintiff and it was at the attorney's office that he first met plaintiff who was introduced to him by the defendant as the man who was buying the property. As pointed out by Mr. Popo, there is a discrepancy here between his evidence and that of plaintiff who stated that he had first met Harry Martin when inspecting the property but in view of what has been said above in regard to the plaintiff's evidence this discrepancy is unimportant. Martin stated that plaintiff produced the money for the first instalment of £200 and in this he was corroborated by Dumakude. The latter gave evidence that after the property had been inspected the plaintiff stated that he wanted to purchase it and would register it in defendant's name as he could not obtain registration in his own name. That subsequently he gave defendant the first instalment of £200 to pay off the purchase price of £450. According to his evidence plaintiff accompanied defendant on every occasion except one when money was paid and he took plaintiff to be the true buyer.

The evidence of Gideon Sali, a builder, was to the effect that plaintiff engaged him to make alterations to the house and to repair the roof and that although defendant was there he did not interfere in any way and he, Gideon, regarded plaintiff as the owner of the premises and defendant as a tenant. He accompanied plaintiff to purchase materials for the building and was paid by plaintiff.

Finally, Stanford Dabi, in whose name the property was nominally registered, although it belonged to Martin, testified that plaintiff had told him in the presence of the defendant that he (plaintiff) had bought the property and that the tenants should be told and that defendant did not object. He (Stanford) regarded plaintiff as the owner even though defendant two months later ordered him to vacate the premises.

Dumakude's evidence was attacked on the ground that he and defendant had previously quarrelled about a case in which the latter's sister was involved but there is little evidence to support this and even if it were so it is, as pointed out by Mr. Allam who appeared on behalf of the respondent, unlikely that he would have bided his time and then taken advantage of this case to injure the defendant. Defendant also stated that he and Sali had quarrelled but he could advance no reason why Martin or Stanford should give evidence against him nor why plaintiff should have fabricated a case against him.

The defendant has given evidence that he bought a house but as pointed out by the Commissioner, his account of how he financed the purchase is far from convincing.

Mr. Popo argued that the evidence of defendant's witness, Julius Fuzile, had not been discarded by the Commissioner who merely ponited out that it was strange that a casual acquaintance should give evidence of this nature. It is true that the Commissioner did not give any reasons for rejecting Julius' evidence but the probative value of the evidence given by plaintiff's witnesses is sufficiently strong to warrant the acceptance of their evidence in preference to that of Julius.

On the probabilities and the evidence before the Court then, the Commissioner was correct in coming to the conclusion that the plaintiff had purchased the property.

It is clear that the plaintiff is still not qualified to take transfer of the property and as the location superintendent is not a party to the action it would not be competent to give effect to the request contained in paragraph (*a*) of the prayer and to order that the property should be transferred into the name of the plaintiff or his wife, see *Mdonga and Lumka verses Mapoma* 1960 N.A.C. 71, at pages 73 to 74. In any case there has been no cross-appeal on this point so that no further comment thereanent is necessary.

That the agreement between the plaintiff and defendant to register the improvements in the name of the defendant was illegal and an evasion of regulation 8 read with regulation 10 of chapter III of the regulations for the Municipality of East London relating to Duncan Village contained in Government Notice No. 260 of 1957, is self evident and was conceded by Mr. Allam.

Mr. Allam, however, advanced the argument that defendant's title to the property was also defective in that, if his evidence was to be believed, he had purchased it from a person, Harry Martin, who had no right to sell it and who himself held it in contravention of the Municipal regulations as was common cause. However, we are not here concerned with the transaction between Martin and defendant but between plaintiff and defendant and the manner in which defendant acquired his title is, to my mind, not relevant to this case.

As the agreement between the parties to register the property in defendant's name was illegal and entered into with intent to circumvent the location regulations of the East London Municipality, in that plaintiff did not fall within the category of persons specified in the regulations as being entitled to acquire property in the location, it is clearly in *frauden legis* and contrary to public policy as expressed in the regulations and the appeal must, therefore, succed on this ground, see *Mabote versus Thaele,* 1938, N.A.C. (C. & O.) 47 in which reference is made to the case of *Singama versus Jevi,* 1916, E.D. L.D. 444 where it was held that an agreement entered into in fraud of the municipal regulations was null and void as being against public policy.

The case of *Jajbhay versus Cassim,* 1939, A.D. 539, at pages 550 and 558 is authority for holding that " Courts will discourage illegal transactions but the exceptions show that where it is necessary to prevent injustice or to promote public policy it will not rigidly enforce the general rule " but here it is clearly in the public interest that such illegal contracts should be suppressed and no good ground has been advanced why the general rule should be departed from. The case of *York Estates Ltd., versus Wareham,* 1950, (1) S.A. (S.R.) 125, at page 128 is also authority for the view that the Court is bound to refuse to enforce a contract which is illegal even though no objection to the illegality thereof is raised by the parties.

As stressed by Mr. Popo the present case was not one where the plaintiff sought to escape the consequences of an illegal act but he sought to obtain the help of the Court in enforcing an illegal contract and this the Courts will not countenance, see *Bobrow versus Meyerowitz,* 1947, (2) S.A. (T.P.D.) 885, at page 891.

The Court *a quo* being, as it was, unable to give judgment for plaintiff as requested in paragraph (*b*) of the prayer as there was no satisfactory evidence of what rentals, if any, had not been accounted for, adopted the view that defendant had been unduly enriched at the expense of plaintiff and ordered that he should repay the sum of R900, the purchase price of the property, to plaintiff who presumably was to remain as owner. The Commissioner relied on the case of *Kolisi versus Kolisi,* 1941 N.A.C. (C. & O.) 68 which is a case somewhat similar to the present one as authority for his action. But in that case the alternative claim specifically asked for payment of the amount disbursed by plaintiff in respect of the purchase of the property concerned. In the instant case there is no such prayer, but Mr. Allam argued that the first part of paragraph (*a*) of the prayer for relief amounted to a request for a declaration of rights and that that, in effect, was what the judgment of the Commissioner amounted to. However, a reference to the prayer indicates that in paragraph (*a*) the plaintiff was asking not only for a declaration of rights but that he or his wife should be entitled to have the lease in respect of the hut site transferred to one or the other.

It is clear from the pleadings that when plaintiff issued his summons he did not have the recovery of his disbursements in mind and the Commissioner disregarded this when endeavouring to give an equitable judgment and in doing so he was wrong. Nor could his judgment be appropriately given under paragraph (*d*) of the prayer, i.e. the salutary clause see *Jones' and Buckles' Civil Practice in Magistrates' Courts in South Africa* (Sixth Edition) at pages 392 to 393 where it is stated that "the practice of adding an additional claim for further or alternative relief will not assist a plaintiff who seeks relief of a different nature from that asked for in the summons"; see also *Becks' Pleadings in Civil Actions* (Second Edition), at pages 46 to 47 where the relevant authorities are cited.

The appeal, therefore, succeeds and should be allowed, with costs. However, the plaintiff may be able to establish a claim for relief on the basis of undue enrichment or on some other basis. The Commissioner's judgment should, therefore, be altered to read:—

Absolution from the instance, with costs.

Grant and Muir, Members, concurred.

For Appellant: Mr. D. Z. Popo of East London.

For Respondent: Mr. B. A. Allam of East London.

SOUTHERN BANTU APPEAL COURT.

MAYEKISO vs. MAYEKISO.

N.A.C. CASE No. 24 OF 1962.

KING WILLIAM'S TOWN: 26th February, 1963. Before Balk, President, Yates and Oscroft, Members of the Court.

NATIVE CUSTOM.

Funeral ceremony—provision and slaughter of beast—duty of senior male relative in this respect. Necessary requirements for son to become recognised as member of natural father's family.

Summary: At the conclusion of an enquiry held in terms of section 3 (3) of Government Notice No. 1664 of 1929 to determine the heir to a quitrent lot the presiding judicial officer awarded it to Claimant No. 1 (now respondent). Claimant No. 1 based his claim on the allegation that he was the son of the late Mtembiso by the latter's customary union with Nominiti and as such his heir and that Mtembiso was the eldest son of Maqqadaza (since deceased) the registered owner of the allotment.

Claimant No. 2 (present appellant) contended that respondent was an illegitimate child of Mtembiso's and that in the absence of legitimate male children he, as the next eldest brother of Mtembiso, was entitled to succeed.

In granting the allotment to Claimant No. 1 the presiding judicial officer stated in his reasons that he relied, *inter alia*, on the fact which emerged from the evidence for Claimant No. 2 and his witnesses, that when Maqqadaza's widow died it was Claimant No. 1 who, with the concurrence of Claimant No. 2 and the latter's younger brother, provided and slaughtered a beast for the funeral ceremony.

Held: That, bearing custom in mind, it was hardly credible that Claimant No. 1 would have been allowed to provide and slaughter the beast if he had not been considered a full member of the family and he could only have been so recognised if in fact either dowry had been paid by his natural father for his mother or he had been "acquired" by his natural father by payment of the full "fine" and the *isondlo* beast.

Appeal from a finding of the Assistant Bantu Affairs Commissioner, Lady Frere.

Yates (Permanent Member):

At the conclusion of an enquiry held in terms of section 3 (3) of Government Notice No. 1664 of 1929 to determine the heir to quitrent Lot No. 210, Macubeni Location, Glen Grey District, the Assistant Bantu Affairs Commissioner awarded it to Claimant No. 1 (now respondent) and awarded costs against Claimant No. 2 (present appellant).

An appeal to this Court in terms of section 3 (5) of the above Government Notice is brought on the grounds that the award is against the weight of evidence and the probabilities of the case.

Respondent based his claim on the allegation that he is the son of the late Mtembiso by the latter's customary union with Nominiti and as such his heir and that Mtembiso was the eldest son of Magqadaza (since deceased) the registered owner of the allotment.

The appellant contended that respondent was an illegitimate child of Mtembiso's and that in the absence of legitimate male children, he, as the next eldest brother of Mtembiso, was entitled to succeed.

The crisp point for decision, therefore, is whether or not Mtembiso had entered into a customary union with Nominiti, also known as Nonana, the mother of respondent.

There are, as stressed by Mr. Kelly in his argument on behalf of the appellant, material inconsistencies in the evidence adduced on behalf of respondent. In particular, as pointed out by him, respondent's witness, Poko, confirmed the evidence of appellant and his younger brother, Patsi, who gave evidence for him, that Nominiti, respondent's mother, lived with a man called Jaji at her kraal for many years and had children by him and that he was buried at her kraal whereas she denied that she knew the name of the man who had fathered these children and did not know whether he was alive or dead.

The discrepancies indicate that without corroboration not much reliance can be placed on the evidence of respondent's witnesses but, in his reasons for judgment, the Commissioner indicated that in accepting the fact that Mtembiso and Nominiti had entered into a customary union and that dowry had been paid he did not only rely on their evidence to that effect but also on the following factors which emerged from the evidence of appellant and his witnesses and which indicated that respondent had been accepted as a legitimate member of the family, viz., that two years before the death of Magqadaza's widow she had given permission to respondent to use the land in question on the half-shares; that when respondent had been seriously assaulted it was Patsi who had cared for him and brought an action on his behalf; and, most significant of all, that when Magqadaza's widow died it was respondent who provided and slaughtered a beast for the funeral ceremony with the concurrence of appellant and Patsi. They attributed these acts to neighbourliness but bearing custom in mind it is hardly credible that respondent would have been allowed to provide and slaughter the beast if he had not been

considered a full member of the family and he could only have been so recognised if in fact either dowry had been paid by his natural father for his mother as testified to by the respondent's witnesses or he had been "acquired" by his natural father by payment of the full "fine" and the *isondlo* beast, both of which events were denied by appellant and his brother, Patsi.

In the circumstances the Commissioner cannot be said to be wrong in coming to the conclusion that respondent is the heir and the person entitled to the land in question and the appeal should, therefore, be dismissed, with costs.

Balk, President, and Oscroft, Member, concurred.

For Appellant: Mr. H. J. C. Kelly of Lady Frere.

For Respondent: In person.

SOUTHERN BANTU APPEAL COURT.

LEMBESE vs. MAYILE.

N.A.C. No. 25 of 1962.

King William's Town: 1st November, 1962. Before Yates, Acting President, Muir and Grant, members of the Court.

NATIVE LAW AND CUSTOM.

Adultery—wife living at another kraal—standard of proof required in rebuttal of presumption of adultery.

Summary: In his particulars of claim the plaintiff (now respondent) alleged that during his absence at work his wife, Tyokolozi, deserted from his kraal and on his return he found her at defendant's (present appellant's) kraal where she was living with defendant as his wife. Defendant admitted in his plea that plaintiff had found his wife at his (defendant's) kraal but denied that she had lived with him as his wife or that he had committed adultery with her.

In view of the defendant's admission the Assistant Bantu Affairs Commissioner ruled that the onus was on him to commence and at the close of his case and without hearing any evidence for the plaintiff, held that the defendant had failed to discharge the onus on him of rebutting the presumption of adultery and gave judgment for plaintiff accordingly.

The evidence for the defence was to the effect that when Tyokolozi came to defendant's kraal she was unknown to him; that he agreed to her coming at the request of her aunt whom he knew and to whom he was related; that Tyokolozi's explanation for seeking a place to stay was that at the kraal where she was she quarrelled with her sister and children; that he reported Tyokolozi's presence at his kraal to the headman of his location but not to Tyokolozi's relatives as she had come from the kraal of a relative and had been brought to his kraal by her maternal aunt; that his (defendant's) wife was away from his kraal when Tyokolozi arrived as she was ill and undergoing treatment but that he had told her of the woman's arrival; that Tyokolozi occupied a hut belonging to defendant situated some distance from his main kraal and that when her child became ill she came to him at his main kraal where his two brothers, their wives and children also stayed.

The fact that the onus was placed on the defendant was not appealed against.

Held: That it was clear that the Commissioner relied entirely for his judgment on the dictum in the case of *Mcotshana versus Jikumlambo* 2, N.A.C. 120 (1910-1911), viz.; "ordinarily in a case where a married woman leaves her husband and is found living at the kraal of another man, the Court hearing the case would be justified in presuming that she was there for the purposes of adultery. The onus would be upon her and upon the man at whose kraal she was found to produce the strongest possible proof of innocence"; but that it was clear from the use of the word "ordinarily" at the outset of this sentence that the circumstances of each case of the nature in question should be taken into account and judged on its merits.

Held further: That any inference of adultery that could have been drawn from the fact that plaintiff's wife had stayed at and was found at defendant's kraal had been entirely rebutted by the evidence led by defendant and that the Assistant Bantu Affairs Commissioner was therefore wrong in holding that adultery had been committed.

Cases referred to:

Mcotshana versus Jikumlambo, 2 N.A.C. 120 (1910-1911).

Gumbi versus Gumede, 1959, N.A.C. 26.

Seymour's Native Law in South Africa (*Second Edition*), at page 84.

Gcukumani versus N'tshekisa, 1958, N.A.C. (C. & O.) 28 at page 29.

Appeal from judgment of Bantu Affairs Commissioner's Court, Lady Frere.

Yates (Acting President):

This is an appeal from a judgment of a Bantu Affairs Commissioner's Court for plaintiff (present respondent) as prayed, with costs, in an action in which he sued defendant (present appellant) for three head of cattle or their value, R60, as damages for the latter's adultery with his customary wife, Tyokolozi, *alias* Motozamile.

In his particulars of claim he alleged that during his absence at work his wife deserted from his kraal and on his return he found her at defendant's kraal where she was living with defendant as his wife.

Defendant admitted in his plea that plaintiff had found his wife at his (defendant's) kraal but denied that she had lived with him as his wife or that he had committed adultery with her.

In view of defendant's admission the Assistant Bantu Affairs Commissioner ruled that the onus was on him to commence and at the close of his case and without hearing any evidence for the plaintiff held that the defendant had failed to discharge the onus on him of rebutting the presumption of adultery and gave judgment for plaintiff accordingly.

The appeal is brought on the grounds:

"(1) That the judgment is against the weight of evidence.

(2) That the Assistant Native Commissioner erred in finding that the Defendant (now appellant) had failed to discharge the onus cast on him to prove that he had not committed adultery with the wife of the Plaintiff (now respondent).

(3) That the evidence adduced on behalf of the defendant (now appellant) did not entitle the Assistant Native Commissioner to find on a balance of probabilities that the defendant (now appellant) had in fact committed adultery; and that the plaintiff (now respondent) was required to adduce evidence to establish that adultery had been committed."

The fact that the onus was placed on defendant has not been appealed against and therefore calls for no comment.

It is clear that the Commissioner relied entirely for his judgment on the dictum in the case of *Mcotshana versus Jikumlambo* 2, N.A.C. 120 (1910-1911), viz., " ordinarily in a case where a married woman leaves her husband and is found living at the kraal of another man, the Court hearing the case would be justified in presuming that she was there for the purposes of adultery. The onus would be upon her and upon the man at whose kraal she was found to produce the strongest possible proof of innocence." However, it is clear from the use of the word " ordinarily " at the outset of the sentence that the circumstances of each case must be taken into account and judged on its merits.

As has been stressed in a number of previous cases the standard of proof required to prove adultery is that required in all civil cases, i.e. that there must be a preponderance of probabilities rather than the criminal standard of proof beyond a reasonable doubt. There must be sufficient proof to carry conviction to a reasonable mind, see *Gumbi versus Gumede,* 1959, N.A.C. 26.

Mr. Barnes, who appeared for the respondent, argued that the presumption raised by the fact that the woman was discovered at defendant's kraal coupled with his failure to report her presence there to her relatives and the admissions made by him were sufficient to establish the plaintiff's case. However, to my mind, here, the defendant has, at the very least, established a *prima facie* case. He has denied the adultery on oath. He and his witnesses have given a full explanation as to how the woman came to his kraal and that when she came she was unknown to defendant who agreed to her coming at the request of her aunt whom he knew and to whom he was related. Tyokolozi's explanation for seeking a place to stay was that at the kraal where she was she quarelled with her sister and children so that it is obvious that at that stage there was no suggestion that she went to defendant's kraal for any immoral purpose.

The Commissioner also commented upon the fact that defendant did not report her presence at his kraal to her relatives but his (defendant's) explanation in this regard is, to my mind, adequate. He stated that she came in November, 1960, from the kraal of Mtini Pezi, a relative living in the same location, and was brought by her maternal aunt, so that he obviously was under the impression that her relatives knew of her whereabouts. He made no secret of her presence and in fact reported it to the headman of his location in the following (Christmas) month, as he understood this was required by law.

The defendant and his witnesses admitted quite freely that defendant's wife was away from home when the woman arrived as she was sick and undergoing treatment and she herself confirms defendant's evidence that he told her of the woman's arrival, which is hardly the action of an adulterer.

In addition, as pointed out by Mr. Kelly who appeared on behalf of the appellant, had there been evidence that the woman had been made pregnant or had given birth to a child at defendant's kraal, it would have added considerably to defendant's difficulties in rebutting the presumption that adultery had taken place.

There is in fact no evidence whatever that adultery was committed. On the contrary the evidence of defendant and his witnesses is to the effect that Tyokolozi was accepted as a visitor, that she occupied a hut belonging to defendant situated some distance away from his main kraal and that when her child became ill she came to live at his main kraal where his two brothers, their wives and children also stayed. Both his wife who returned while the woman was still at his kraal and his brother's wife have stated that they had no reason to suspect that defendant was committing adultery with her. According to defendant's evidence he regarded her as a relative and this is borne out by Mtini who stated that she and the defendant are related by blood and clan. It would, therefore, have been disgraceful for him to have had intercourse with her, see *Seymour's Native Law in South Africa* (Second Edition) at page 84.

It is significant also that plaintiff visited his wife at defendant's kraal in April, 1961, and subsequently both at the headman's enquiry and before the Commissioner his only complaint was that his wife did not return to him. The defendant urged her to leave his kraal and return to her husband and made no attempt whatever to detain her. In fact plaintiff left her at defendant's kraal and it was only after her return to her husband in January, 1962, that defendant first heard that he was being accused of adultery. Tyokolozi's explanation that she was under *teleka* and would not return until her husband fetched her from her maiden kraal is entirely in accordance with custom and an acceptable explanation of her refusal to return to her husband.

As pointed out above, adultery cases like all other civil cases must be decided upon a balance of probabilities, see *Gcukumani versus N'tshekisa,* 1958, N.A.C. (C. & O.) 28 at page 29, but here it seems to me that any inference that could have been drawn from the fact that plaintiff's wife had stayed at and was found at defendant's kraal has been entirely rebutted by the evidence led by defendant and that the Commissioner was therefore wrong in holding that adultery had been committed.

Mr. Kelly requested that the appeal should be allowed and the judgment of the Bantu Affairs Commissioner set aside and the case returned to enable the plaintiff to produce such further evidence as he may deem necessary.

In accordance with his request the appeal is allowed, with costs, the judgment of the Bantu Affairs Commissioner is set aside and the case returned to enable plaintiff to produce such further evidence as he may deem necessary.

Grant and Muir, Members, concurred.

For Appellant: Mr. H. J. C. Kelly of Lady Frere.

For Respondent: Mr. B. Barnes of King William's Town.

SOUTHERN BANTU APPEAL COURT.

NDLALA d.a. vs. MAKINANA.

N.A.C. CASE No. 23 OF 1962.

UMTATA: 22nd January, 1963. Before Balk, President, Yates and Collen, Members of the Court.

NATIVE CUSTOM.

Arrangement for disposal of property of minor heir—duty of guardian in this respect. Native custom—general.

PRACTICE AND PROCEDURE.

Appointment of curator ad litem *to assist minor in bringing action where natural guardian's interests clash with those of minor. Evidence—evidential value of dipping foreman's records.*

Summary: The plaintiff, a minor, sued the defendant for certain specific cattle and their increase. Defendant's case was that he became the owner of the cattle in dispute on their payment to him as dowry for his daughter, Nomfazi, the plaintiff having been a party to the payment and having himself delivered the cattle to him. The plaintiff denied these allegations and stated that he had been away when the dowry in question was discussed and paid. It was common cause that prior to the payment the plaintiff was the owner of the cattle having inherited them from his late father and that at the time of payment the plaintiff was a minor in his early teens.

In bringing the action the plaintiff was assisted not by his guardian according to Native law, but by one Mbila Sityebe. the reason therefor being that the interests of his legal guardian clashed with those of the plaintiff in regard to the matter in dispute.

In his reasons for judgment the presiding judicial officer stated that it was an accepted procedure, where there was no adult heir, for the great wife and other members of the kraal to arrange for the disposal of a minor heir's property in the presence of the minor heir and that he was then presumed to have consented and to have been aware of the exact nature of the arrangement.

As proof of the increase of the twelve head of cattle the plaintiff handed his stock card in to Court and further called a dipping foreman to hand in certain permits and dipping records as evidence of transfers of cattle from one party to another.

The Court *a quo* granted judgment for defendant with costs, and the plaintiff appealed to this Court.

Held: That according to custom an arrangement on behalf of a minor heir for the disposal of his property is made not by his widowed mother nor by him but by his guardian in consultation with his other close adult paternal male relatives and with the widow as well as such minor if the latter has reached the age of understanding.

Held further: That the evidence for the defendant abounded in improbabilities as regards Native custom as appears from the judgment.

Held further: That the presiding judicial officer ought to have formally appointed Mbila Sityebi, who assisted plaintiff, a minor, in bringing the action as a *curator ad litem* before proceeding with the case.

Held further: That the stockcard, dipping records and permits were inadmissible as proof of the facts stated therein, i.e. proof of their contents, as they could not be regarded as public documents as not only was it not shown that the public had the right of access thereto but there was nothing to indicate that it was the duty, imposed by law, of the official who made the entries therein to satisfy himself as to their correctness.

Cases referred to:

Scoble's Law of Evidence (Third Edition), pages 276 to 277.

Appeal from judgment of Bantu Affairs Commissioner's Court, Elliotdale.

Balk **(President):**

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court for defendant (now respondent), with costs, in an action in which he was sued by the plaintiff (present appellant) for twelve specific head of cattle and their increase of six head.

The appeal is confined to fact.

The defendant's case, according to his plea and evidence, is that he became the owner of the twelve cattle in dispute on their payment to him as dowry for his daughter, Nomfazi, the plaintiff having been a party to this payment and having himself delivered the cattle to him.

In the course of his testimony the plaintiff denied these allegations and stated that he had been away when the dowry in question was discussed and paid.

It is common cause that prior to the alleged payment the plaintiff was the owner of the cattle having inherited them from his late father, Ndlala (hereinafter referred to as " the deceased ") and that at the time of this payment the plaintiff was a minor in his early teens.

It is also common cause that the plaintiff is the deceased's son by his junior wife, Nongqungile, and that the deceased's senior wife, Nokanisana, had no male issue.

That the cattle have remained registered in the plaintiff's name in the dipping records was admitted by the defendant in the course of his evidence.

As submitted by Mr. Muggleston in his argument on behalf of the appellant, the evidence for the defendant abounds in improbabilities as will be apparent from what follows.

The defendant would have the Court believe that the plaintiff had handed the cattle back to him after they had been taken away by his mother, Nongqungile, and that the plaintiff had then stated that he wished to consult her before having them transferred to the defendant's name in the dipping records, a most unlikely attitude on the plaintiff's part; for had he desired to consult his mother, he would surely have done so before returning the cattle to the defendant. Then, the defendant stated that he had told the plaintiff that he could take Nomfazi back when he came looking for her subsequent to the restoration of the cattle to him (defendant) yet instead of doing so the plaintiff had despoiled the cattle, an equally unlikely attitude on the plaintiff's part regard being had to custom. Again, the defendant admitted that he had not sued the plaintiff over the past five years to compel him to have the cattle transferred to his name in the dipping records and his explanation for not doing so, viz., because the plaintiff had kept on promising to effect the transfer, is singularly unconvincing bearing in mind that the plaintiff had not only not carried out his alleged promises over the lengthy period involved but had spoliated the cattle two years prior to the hearing of the instant case and that the defendant had to apply to the Court for a *mandament van spolie* to recover them.

The defendant's allegation that he did not know Gungqana, the father of Mtyana, with whom the defendant's daughter, Nomfazi, contracted the customary union in respect of which the twelve head of cattle in dispute were paid as dowry, is highly improbable on the face of it regard being had to custom and to the fact that Gungqana and the defendant are neighbours.

According to the defence witnesses, Nontwasuke and Manini, they were told when the cattle were delivered to them as dowry for Nomfazi that they could not be transferred to the defendant's name in the dipping records owing to a dispute between Nokanisana and Nongqungile as regards who was the deceased's heir. In view of this friction involving, as it did, Nongqungile's son,

the plaintiff, it is most unlikely that the latter would have agreed to the payment of the cattle as dowry on behalf of Mtyana or have returned the cattle to the defendant as alleged by the latter and his witnesses particularly as the plaintiff was not, consonant with custom, in any way responsible for the payment of this dowry.

Then, Manini stated that the plaintiff and Nokanisana sat apart when the dowry was discussed and the men taking part in the discussion informed them thereof whereas Nomfazi in her evidence for the defendant said that the plaintiff was amongst the men discussing the dowry. There is no room for mistake here so that this discrepancy in the defence evidence makes it difficult to escape the conclusion that the defence allegation that the plaintiff was present when the dowry was discussed and was a party to the payment of his cattle in respect of the dowry and had himself returned the cattle to the defendant after his mother, Nongqungile, had taken them from the defendant, is a fabrication and that the truth lies in the plaintiff's version that he was not present at the dowry discussions and payment and was not a party thereto and that he had not returned the cattle to the defendant.

The Bantu Affairs Commissioner states in his reasons for judgment that "it is an accepted procedure, when there is no adult heir, for the great wife and other members of the kraal to arrange such matters (referring to the payment of the plaintiff's cattle in respect of the dowry) in the presence of the minor heir and he is then presumed to consent and be aware of the exact nature of the arrangement". The Commissioner does not state how he came to regard this as the accepted procedure. However, that may be, that procedure does not accord with custom whereunder an arrangement on behalf of a minor heir for the disposal of his property is made not by his widowed mother nor by him but by his guardian in consultation with his other close adult paternal male relatives and with the widow as well as with the minor if the latter has reached the age of understanding. It should be added that under cross-examination the defendant admitted that custom did not permit of a minor or a widow on their own paying dowry stock which, as indicated above, is the correct position. It is manifest from Nontwasuke's evidence for the defendant that the plaintiff's guardian, Gungqana, was not present at the dowry discussions nor at the payment of the dowry nor is there anything to indicate that any of the plaintiff's other adult paternal male relatives were present thereat. On the contrary, Manini admitted under cross-examination that two of the three men said to have been present on the plaintiff's side, viz., Sankwankwa and Nkonyovu, were not related to the plaintiff and there is nothing to show that the third man, Nase, was so related. It follows that the whole procedure relied upon by the defendant as establishing the payment of the dowry to him for Nomfazi is contrary to custom and it is, therefore, extremely improbable that the plaintiff would have acquiesced in the payment of the dowry at the discussions particularly as he was not, as pointed out above, in any way responsible therefor according to custom. In the circumstances, it is evident that the defendant's case is a fabrication and that the plaintiff is entitled to succeed in his claim.

The plantiff's version that there were six progeny of the twelve head of cattle and not five as stated by the defendant falls to be accepted for the same reason.

Certain other matters call for mention. In the first place the Bantu Affairs Commissioner ought to have formally appointed Mbila Sityebi who has assisted the plaintiff, a minor, in bringing the action as the latter's *curator ad litem* before proceeding therewith as the plaintiff's natural guardian, Gungqana, would, as pointed out by the Commissioner, have been antagonistic towards the plaintiff in that the cattle in dispute had been paid as dowry on behalf of Gungqana's son, Mtyana. This aspect, it should

be added, becomes a mere technicality at this, the appeal, stage as the defendant did not at the trial pursue the objection in his plea to Mbila assisting the plaintiff. In any event this point was not taken on appeal.

Secondly, the plaintiff should not have been allowed to put in his stock card in proof of the increase of the twelve cattle as it is hearsay in this respect in that it cannot be regarded as a public document as not only was it not shown that the public have a right of access thereto but there is nothing to indicate that it was the duty, imposed by law, of the official who made the entries on the stock card to satisfy himself as to their correctness, see *Scoble's Law of Evidence* (Third Edition) at pages 276 and 277 and the authorities there cited. For the same reason the Commissioner ought also not have permitted the plaintiff's witness, dipping foreman, Davis Cala, to produce the dipping records nor should he have allowed him to put in the permits as they are not probative of the transfers seeing that there is nothing in them indicating that the transfers took place and even if there were such an indication, it would be hearsay for the reason given above. The erroneous admission of this evidence does not, however, affect the outcome of the case as the plaintiff was clearly entitled to succeed on the remaining evidence only.

In the result the appeal should be allowed, with costs, and the judgment of the Bantu Affairs Commissioner's Court altered to one for plaintiff, as prayed, with costs, i.e. for the specific twelve head of cattle and their specific six progeny claimed or payment of their value at the rate of R40 per beast, with costs.

Yates and Collen, Members, concurred.

For Appellant: Mr. K. Muggleston of Umtata.

For Respondent: Mr. F. G. Airey of Umtata.

SOUTHERN BANTU APPEAL COURT.

YAMBA vs. NJILI.

N.A.C. CASE No. 57 OF 1961.

UMTATA: 1st February, 1963. Before Balk, Persident, Yates and Hastie, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal from Chief's Court—alteration of Chief's judgment on appeal where evidence not justifying judgment for either party.

Held: That where on appeal to a Bantu Affairs Commissioner's Court from the judgment of a Chief's Court for plaintiff, it is found that the evidence does not justify a judgment for either party the Bantu Affairs Commissioner in sustaining the appeal, with costs, should alter the judgment of the Chief's Court to one dismissing the plaintiff's claim, with costs, which accords most with the practice of Chief's Courts and is equivalent to a decree of absolution from the instance.

Cases referred to:

Mzileni versus Mputa, 1957, N.A.C. 70 (S), at page 73.

Appeal from judgment of Bantu Affairs Commissioner's Court, Kentani.

Balk (President):

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court dismissing, with costs, an appeal from the judgment of a Chief's Court for plaintiff (now respondent) for five head of cattle or their value, £50, in a action based by him on the defendant (present appellant) having rendered one, Selina, pregnant.

The claim, as restated in the Commissioner's Court, is for the same quantum of damages for the seduction and pregnancy of the plaintiff's daughter, Selina, by the defendant which was denied by the latter in his plea so that the onus of proof rested on the plaintiff.

The appeal to this Court is confined to fact.

As stressed by Mr. Muggleston in his argument on behalf of the appellant, the plaintiff relies on the evidence of Selina and her sister, Jeselina, to establish his case and there are flagrant discrepancies between their evidence as regards when the defendant came to their kraal to fetch Selina for intimacy.

Then, there is the blatant inconsistency in Selina's evidence as to when the defendant first had full sexual intercourse with her.

Again, although Selina stated that she had reported to the defendant that she had missed her periods and had then insisted on his marrying her, she said she did not know she was going to have a child which is strange to say the least.

Mr. Airey in his argument for the respondent, pointed out that, as was apparent from the Commissioner's reasons for judgment, he took the discrepancies between Selina's and Jeselina's evidence into account and went on to submit that the Commissioner had correctly held that the discrepancies were not fatal to the plaintiff's case. But, in my judgment, the Commissioner's reason for that view i.e. the lapse of time between the alleged intimacy and the testimony in regard thereto cannot be regarded as a valid one bearing in mind the gross flagrancy of the discrepancies in relation to the comparatively short period that elapsed between the events testified to and the testimony thereanent.

As pointed out by Mr. Airey the defendant's evidence not only stands alone but his witness, Sofolina, contradicted him so that he is not entitled to a full judgment.

It follows that the Commissioner was wrong in finding for the plaintiff and should instead have allowed the appeal from the judgment of the Chief's Court, with costs, and altered that judgment to one dismissing the plaintiff's claim, with costs, which accords most, with the practice of such Courts where neither party has proved his case and is equivalent to a decree of absosolution from the instance, see *Mzileni versus Mputa,* 1957, N.A.C. 70 (S), at page 73.

The appeal to this Court should accordingly be sustained, with costs, and the judgment of the Bantu Affairs Commissioner's Court altered to read as follows:—

> "The appeal is allowed, with costs, and the judgment of the Chief's Court is altered to one dismissing the plaintiff's claim, with costs."

Yates and Hastie, Members, concurred.

For Appellant: Mr. K. Muggleston of Umtata.

For Respondent: Mr. F. G. Airey of Umtata.

SOUTHERN BANTU APPEAL COURT.

RANOSI d.a. AND ANO. vs. RANOSI.

N.A.C. CASE No. 34 OF 1962.

UMTATA: 30th January, 1963. Before Balk, President, Yates and Hastie, Members of the Court.

EVIDENCE.

Admissible declaration by deceased as to pedigree—where uncontroverted such declaration decisive of parties' pedigree. Not proper to base inference adverse to witness' credibility on a generality.

Summary: Plaintiff based his claim for certain cattle or their value on the fact that they had belonged to one Ratsilibili Ranosi at the time of his death and that he, plaintiff, was entitled to them as he was the deceased's heir, the deceased having died leaving no legitimate male issue surviving him and he (plaintiff) being the eldest son of the deceased's next eldest brother, also deceased.

It was common cause that the deceased was the second defendant's natural father by one Mathabo.

The defence version, which was denied by the plaintiff, was that the deceased had paid dowry for and contracted a customary union with Mathabo.

Plaintiff's brother during the course of his evidence for the plaintiff averred that the deceased had, on an occasion when he and the plaintiff had visited him, stated that the plaintiff was his heir and not the second defendant in that he had not contracted a customary union with the second defendant's mother. Plaintiff's brother stated further that the first defendant was present when the deceased made this declaration. The first defendant did not give evidence.

According to the presiding judicial officer's reasons for judgment he held against one of the witnesses the generality that in so many cases involving Natives where there is a plurality of customary unions, any claim by the heir was invariably resisted by the inmates of the lower houses.

The Court *a quo* found for plaintiff as prayed, with costs, and the defendants appealed to this Court.

Held: That as first defendant did not give evidence the allegation in the evidence for plaintiff that the first defendant was present when the admissible declaration as to the parties' pedigree was made remained uncontroverted and this factor was held to be decisive of the parties' pedigree in the circumstances of the instant case.

Held further: That it was not proper for a court to base an inference adverse to a witness' credibility, on a generality.

Cases referred to:

Galante versus Dickinson, 1950, (2) S.A. 460 (A.D.), at pages 464 and 465.

Ndlondlo versus Diniso, 1962, N.A.C. 36 (S), at page 37.

Appeal from judgment of Bantu Affairs Commissioner's Court, Matatiele.

Balk (President).

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court for plaintiff (now respondent) for eleven head of cattle or their value, R330.00, with costs, in an action in which he sued the two defendants (present appellants) therefor. He also claimed certain horses or their value. The lastmentioned claim does not call for consideration as it is not in issue here.

In the particulars of claim in the summons, the plaintiff averred that the cattle were in the defendants' possession, that they had belonged to the late Ratsilibili Ranosi (hereinafter referred to as "the deceased") at the time of his death and that he was entitled to them as he was the deceased's heir.

In their plea the defendants admitted that they were in possession of the eleven head of cattle and that these cattle had belonged to the deceased but they alleged that the second defendant and not the plaintiff was the deceased's heir.

The appeal is brought on the following grounds: :—

"1. That the Judicial Officer erred in holding that there was not a valid marriage between Ratsilibili Ranosi and Mathabo.

2. That the Judicial Officer erred in holding that the stock awarded to plaintiff had not in fact been paid as *lobola* for Defendant's sisters."

The plaintiff's case is that the deceased who, it is common cause, was the second defendant's natural father, did not enter into a customary union with the second defendant's mother, Mathabo, not having paid dowry for her, that the deceased had died leaving no legitimate male issue surviving him and that he (plaintiff), being the eldest son of the deceased's next eldest brother, Jasi, also deceased, was, therefore, the deceased's heir.

The defence version is that the second defendant is the deceased's heir as he was the deceased's only son by Mathabo for whom the deceased had paid dowry and with whom he had contracted a customary union.

It follows that, as submitted by Mr. Airey in his argument on behalf of the appellant, the case turns on the question whether the deceased entered into a customary union with Mathabo. If there was such a union, the defendants were entitled to judgment and, if not, the plaintiff had to succeed.

It is common cause that the deceased and Mathabo lived together as man and wife for a number of years and had a number of children so that, as stressed by Mr. Airey, there is a presumption that there was a customary union between them, see *Songqengqe versus Denge*, 1957, N.A.C. 16 (S), at page 19, cited by him.

As pointed out by Mr. Muggleston in his argument for the respondent, the Bantu Affairs Commissioner gives cogent reasons for accepting the evidence for the plaintiff and rejecting that for the defendants as will be apparent from what follows.

The plaintiff's evidence that the deceased had not paid dowry for Mathabo but merely lived with her is borne out by that of his brother, Mahlomola, who also stated in the course of his evidence for the plaintiff that the deceased had, when he and the plaintiff went to see him on the plaintiff's return from work, said that he had had his cattle transferred to the first defendant who, it is common cause, is his daughter by Mathabo, to enable him to secure a pension and that he had not had the cattle transferred to the second defendant as the plaintiff was his heir and not the second defendant in that he had not contracted a customary union with the second defendant's mother, Mathabo. According to Mahlomola, the first defendant was present when the deceased made this statement; yet, as emphasized by

Mr. Muggleston, the first defendant did not give evidence so that it is difficult to escape the conclusion that the first defendant could not deny that the deceased had made this statement, see *Galante versus Dickinson,* 1950 (2), S.A., 460 (A.D.), at pages 464 and 465. The statement having been made *ante litem motem* by a blood relation of the parties, since deceased, is admissible to prove their pedigree, see *Ndlondlo versus Diniso,* 1962, N.A.C. 36 (S), at page 37, and is in the circumstances of this case decisive of this issue.

That the Commissioner was justified in rejecting the evidence of the defendant's witnesses, Kanati and Susanna, is, as pointed out by Mr. Muggleston, apparent from the blatant inconsistencies therein referred to by the Commissioner in his reasons for judgment. Then as submitted by Mr. Muggleston, there is this further factor justifying the rejection of Kanati's and Susanna's evidence. It arises from the conflict between their evidence and that of the plaintiff's witness, Mapopang, as regard's whether Mathabo had entered into a customary union with Mapopang's son, since deceased, before she was taken by the deceased to live with him. Mapopang alleged that this was the case whereas Kanati and Susanna denied it; and, as also pointed out by Mr. Muggleston, it is most improbable, as found by the Commissioner, that the plaintiff would have gone so far afield to call a witness from another location for the purpose of fabrication particularly as Susanna who was closely related to the plaintiff, stated that she did not know Mapopang indicating that the latter was a stranger to the family. Moreover, as emphasized by Mr. Muggleston, it is difficult to gainsay the Commissioner's further reasons for accepting Mapopang's testimony, viz., because it bore the impress of truth in that she did not profess to know anything about any dowry paid by the deceased for Mathabo and her evidence was given in a satisfactory manner.

In my view Mr. Muggleston's submission that the fact that Mapopang did not know that dowry had been paid for Mathabo, lent itself to an inference that such dowry had in fact not been paid as Mapopang would have been advised of any such payment bearing custom in mind, does not carry much weight for, as pointed out by Mr. Airey, if dowry had been paid by the deceased to Mathabo's " dowry-eater " who lived in Basutoland, the latter may not have disclosed this to Mapopang so as to avoid the restoration (*keta*) of the dowry paid by her late son for Mathabo.

The second defendant's evidence not being probative of his descent, does not advance his case.

The Commissioner's ruling that Susanna's evidence as to the second defendant's descent was inadmissible in that it was hearsay evidence communicated to her by the deceased is erroneous as the communication was made *ante litem motem* by a blood relation since deceased and so was admsisible as a declaration as to the second defendant's pedigree, see *Ndlondlo's* case (*supra.*).

As submitted by Mr. Airey, the Commissioner was not justified in holding against Susanna the generality that in so many cases involving Natives where there is a plurality of customary unions, any claim by the heir is invariably resisted by the inmates of the lower houses as in this respect each case falls to be decided on its own merits. In any event the generality is not apposite here as the issue between the parties is not based on plurality of customary unions but on the question whether or not the deceased entered into a customary union with Mathabo. This misdirection does not, however, effect the merits of the plaintiff's case as the other factors dealt with above amply establish that the deceased did not in fact pay dowry for Mathabo.

In the circumstances, the evidence for the plaintiff suffices to rebut the presumption of a customary union between the deceased and Mathabo arising from their long cohabitation and their having had children, see *Songqengqe's* case (*supra.*)

Mr. Airey abandoned the second ground of appeal and properly so as it is evident from the second defendant's replies in cross-examination that the cattle in question were derived by the deceased from the dowry payments for his daughter of a customary union with a woman other than Mathabo.

In the result the appeal should be dismissed, with costs.

Yates and Hastie, Members, concurred.

For Appellant: Mr. F. C. Airey of Umtata.

For Respondent: Mr. K. Mugglestón of Umtata.

SOUTHERN BANTU APPEAL COURT.

MPISWANA vs. MPISWANA d.a. AND ANO.

N.A.C. CASE No. 37 OF 1962.

UMTATA: 22nd January, 1963. Before Balk, President, Yates and Collen, Members of the Court.

EVIDENCE.

Evidence of dipping foreman in regard to entries in dipping records made by person other than himself—considerations.

Summary: At the trial of the action in the court *a quo* a dipping foreman gave evidence in regard to entries made by a person other than himself in the dipping records under his control.

Held: That the evidence of the dipping foreman was inadmissible as it was manifest that it was based on entries in the dipping records not made by him and was, therefore, hearsay in that such a record cannot be regarded as a public document since not only had it not been shown that the public had the right of access thereto but there was nothing to indicate that it was the duty, imposed by law, of the official who made the entries in the dipping records to satisfy himself as to their correctness.

Cases referred to:

Scoble's Law of Evidence (Third Edition) at pages 276 and 277.

Appeal from judgment of Bantu Affairs Commissioner's Court, Elliotdale.

Balk (President):

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court for defendants (now respondents), with costs, in an action in which they were sued by the plaintiff (present appellant) for certain livestock and other property or the value thereof on the ground that these were assets of the late Mpiswana Kama (hereinafter referred to as "the deceased") whose heir the plaintiff was.

In their plea the defendants admitted that the first defendant had handed some of the livestock to the second defendant for safekeeping but denied that the plaintiff was the deceased's heir.

It is common cause that the deceased contracted a customary union with one Nosekeni who was a widow at the time and that he was the plaintiff's natural father and Nosekeni the plaintiff's mother. It is also common cause that the plaintiff and his younger brother are the only male issue of the deceased.

The plaintiff's case is that he is the son of the deceased's customary union with Nosekeni whereas the defence is that the plaintiff was born before this union was entered into so that according to Tembu custom which obtains here, he belongs to Nosekeni's previous husband's family in the absence of the restoration (*keta*) of the dowry paid by the previous husband for Nosekeni and not to the deceased's family and was, therefore, not the deceased's heir, see *Manunga versus Yekiso,* 1936, N.A.C. (C. & O.) 87, at page 89.

The plaintiff's evidence as to his ancestry does not assist him as it must be regarded as hearsay in that it cannot be taken to be based on a declaration as to his pedigree owing to his not having disclosed the source of his information, see *Ndlondlo versus Diniso,* 1962, N.A.C. 36 (S), at pages 37 to 38.

As conceded by the Bantu Affairs Commissioner in his reasons for judgment, the evidence of the plantiff's witness, Masipula, is strong being free from inconsistencies and bearing the impress of truth including the admission of unfavourable features such as the fact that the dowry paid for Nosekeni in respect of her prior customary union had not been *ketaed;* and Masipula is in the best position to testify regarding the deceased's customary union with Nosekeni and his issue by her as he was her " dowry-eater " and this union was negotiated with him.

The Commissioner, however, considered that as the plaintiff's other witnesses, Mtosholo and Nolitye, were unsatisfactory, Masipula's evidence fell to be regarded as suspect, an aspect that was emphasised by Mr. Airey in the course of his argument for respondent.

Admittedly, there are unsatisfactory features in Mtosholo's and Nolitye's evidence, in the main inconsistencies, the only discrepancy between their evidence and that of Masipula relied upon in this Court being as to when the dowry paid by the deceased for Nosekeni to Masipula was delivered to the latter. But, as pointed out by Mr. Muggleston in his argument on behalf of the appellant, it is manifest from the first defendant's admission under cross-examination that Masipula's version is correct in this respect so that his testimony cannot be regarded as tainted by the unsatisfactory features in question. On the contrary, there is, as stressed by Mr. Muggleston, a feature in the evidence for the defendants confirming Masipula's testimony that until the instant case was instituted the plaintiff's heirship to the deceased was not questioned. The feature to which I refer, is the admission in cross-examination by the defendants' witness, Howana, that he first learnt that he was the deceased's heir when the first defendant who was the deceased's great wife, called him and told him about the present case. It is true that at a later stage in cross-examination Howana stated that he had not derived his knowledge that he was the deceased's heir from the first defendant. But he did not explain how he had come by that knowledge nor how he came to make the admission that he had first learnt that he was the deceased's heir from the first defendant after the institution of the instant action. As submitted by Mr. Muggleston, this admission indicating, as it does, that Howana was imported as an heir by the first defendant at the last moment,

makes it difficult to escape the conclusion that the defence version that Howana was the deceased's heir is a fabrication and that the truth lies in Masipula's version that the plaintiff is the deceased's heir; for had Howana in fact been the deceased's heir it would, in keeping with custom, have been communicated to him by the deceased's family long before the institution of the present proceedings i.e. soon after the deceased's death some ten years previously, and Howana would not have been as disinterested as to what became of the deceased's assets as on his own showing he was.

It follows that the plaintiff established that he is the deceased's heir, this position not being affected by the fact that the dowry paid in respect of Nosekeni's prior customary union was not *ketaed,* see *Mpika versus Mpanda,* 1945, N.A.C. (C. & O.) 66.

Unfortunately, at the instance of the Commissioner and with the concurrence of the attorneys for the parties, the question of the quantum of the assets which belonged to the deceased on his death and came into the defendants' hands was not fully canvassed and accordingly no finding was given on this issue. Consequently it is necessary to remit the case to the Commissioner for further hearing with the resultant additional expense to the parties.

A further point calling for mention is that the evidence of the dipping foreman, Johnson Mqabalala, is inadmissible as it is manifest that it is based on entries in the dipping records not made by him and is, therefore, hearsay in that such a record cannot be regarded as a public document since not only was it not shown that the public have the right of access thereto but there is nothing to indicate that it was the duty, imposed by law, of the official who made the entries in the dipping records to satisfy himself as to their correctness, see *Scoble's Law of Evidence* (Third Edition) at pages 276 and 277 and the authorities there cited.

In the result the appeal should be allowed, with costs, and the judgment of the Bantu Affairs Commissioner's Court set aside and the case remitted to that Court to hear such further evidence as the parties may wish to adduce on the question of the quantum of the deceased's assets for which the defendants are liable to the plaintiff, on the basis that the plaintiff is the deceased's heir and that Johnson Mqabalala's evidence is inadmissible and for a fresh judgment.

Yates and Collen, Members, concurred.

For Appellant: Mr. K. Muggleston of Umtata.

For Respondent: Mr. F. G. Airey of Umtata.

SOUTHERN BANTU APPEAL COURT.

DLODLO vs. DAMBUZA.

N.A.C. CASE No. 37 OF 1961.

UMTATA: 31st January, 1963. Before Balk, President, Yates and Hastie, Members of the Court.

PRACTICE AND PROCEDURE.

Recording of Proceedings—judgments and particulars of postponements to be noted in record—inspections in loco*—necessity for presiding judicial officers to attend and make notes of findings thereat—necessity generally for compliance with provisions of Rule* 55 *of Rules for Bantu Affairs Commissioner's Courts.*

EVIDENCE.

Expression "heavy onus" a misnomer. Witness—inference against party failing to call available witness.

Summary: It appeared that the presiding judicial officer at the trial of the action in the court *a quo* omitted to note his judgment as also particulars of adjournments between the date of set down of the case for hearing and the date on which the hearing actually commenced, in the record of the proceedings of the case.

According to the judicial officer's notes of the proceedings, he adjourned the trial whilst the plaintiff was testifying to enable the parties to inspect an ox in the courtyard. There was nothing to indicate that the judicial officer was present at this inspection *in loco*.

In his grounds of appeal the appellant referred to the "heavy onus" on the plaintiff. The plaintiff's attorney during the course of the trial intimated that he would call a certain witness, who was available, to give evidence on behalf of the plaintiff on the day to which the hearing of the case had been postponed, but he failed to do so giving no reason therefor.

Held: That presiding judicial officers should ensure that they note their judgments as also particulars of postponements in the records of proceedings and in general should comply with the requirements of Rule 55 of the Rules for Bantu Affairs Commissioners' Courts.

Held further: That presiding judicial officers should attend inspections *in loco* and then and there make notes of their findings thereat and communicate such findings to the parties.

Held further: That the expression "heavy onus" referred to in the grounds of appeal was a misnomer as it suggested a wrong approach by the Court, viz., that it ought to have approached the position of certain issues with an inclination to favour one side rather than the other.

Held further: That an adverse inference against a party failing to call a witness was justified where such witness was available and where no reason was given for not calling him.

Cases Referred to:

Ebrahim (Pty.), Ltd., versus Mahomed and Others 1962 (1) S.A. 90 (D. & C.L.D.) at page 94.

Gleneagles Farm Dairy versus Schoombee 1949 (1) S.A. 830 (A.D.) at page 840.

Baba versus Lembese and Another 1962 (2) P.H., R.26 (S.B.A.C.).

Appeal from judgment of Bantu Affairs Commissioner's Court, Mount Frere.

Balk (President):

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court for plaintiff (now respondent) as prayed, with costs, in a vindicatory action in which he claimed a certain red ox or its value, R40 from the defendant (present appellant) averring in the particulars of claim in the summons that he was its owner and that the defendant had spoliated it.

The Assistant Bantu Affairs Commissioner appears to have omitted to note the judgment in the record of the proceedings of the instant case but from the reply of the Clerk of his Court to an enquiry by the Registrar of this Court as to the terms of the

judgment, it is manifest that, according to the civil record book, it was for plaintiff as prayed, with costs, as stated above. This was accepted by both Mr. Airey and Mr. Knopf who appeared in this Court for the appellant and the respondent, respectively. The Commissioner is enjoined to exercise greater care in future and ensure that he notes his judgment in the record of the proceedings of the case at the time he delivers it as it is not sufficient to enter it in the civil record book only. It also appears that the Commissioner did not note in the record of the proceedings adjournments between the date of set down of the case for hearing and the date on which the hearing actually commenced as he ought to have done. In this connection the necessity for proper recording in terms of Rule 55 of the rules for Bantu Affairs Commissioner's Courts cannot be over emphasized.

In his plea the defendant denied that the plaintiff was the owner of the ox and that he had spoliated it and alleged—

> "That during the winter season in 1958, while away at work in Vereeniging, defendant bought through defendant's messenger, Zibokwana Mdanyana, a red (gwaqa) young ox for £18 from Manqinyana Sepiseka of Mandileni Location, Mount Frere; that the said ox got lost about end of October, 1958; that defendant reported the loss of the beast aforesaid to the local stock inspector; and that 4 weeks after the loss of the said beast defendant found the said ox in the grazing land of his location."

The appeal is brought on grounds which resolve themselves to an appeal on fact.

The expression "heavy onus" referred to in the grounds of appeal is a misnomer as it suggests a wrong approach by the Court, viz., that it ought to approach the position of certain issues with an inclination to favour one side rather than the other see *Ebrahim (Pty.), Ltd., versus Mahomed and Others* 1962 (1) S.A. 90 (D. & C.L.D.), at page 94.

It is manifest from the Commissioner's reasons for judgment that the demeanour of both the witnesses for the plaintiff and the defendant impressed him as satisfactory and that he decided the case solely on the probabilities arising from the evidence. But, the probabilities relied upon by him as favouring the plaintiff's case are, as submitted by Mr. Airey, more apparent that real if viewed in their proper perspective as will appear from what follows.

The fact that the defendant found the ox in dispute after it had been missing for a month, at about the same time as the plaintiff lost his ox and that the former ox was similar in appearance to the latter, does not in itself indicate that the truth lies with the plaintiff for the decisive factor still remains identification.

Then, the Commissioner's finding that the ox produced at the trial bore the plaintiff's earmarks does not appear to have been substantiated in the absence of any findings by him relating to its inspection *in loco,* an aspect which will be further commented on later in this judgment, coupled with the fact that the description of the earmarks given by the plaintiff's witness, Johan Dambuza, who stated that he was the plaintiff's brother and neighbour and knew his cattle, differed from that given by the plaintiff and his witness, Dalibunga. Admittedly, the plaintiff's witnesses knew his ox for a far longer period than the defendant and his witnesses knew the defendant's ox but that is all the more reason why there should not have been the foregoing discrepancy as to the earmarks. Moreover, there is this further discrepancy in the evidence for the plaintiff that whereas he stated that the broken foreleg of his ox had knit without leaving any visible sign of this fracture, his herdboy, Dalibunga, identified the ox by a visible lump at the fracture. This discrepancy is accentuated by the inconsistency in the plaintiff's evidence as to

whether the defendant brought the ox to the headman's kraal and the improbability, bearing custom in mind, that the men there were told to feel the ox's leg but to keep quiet in regard to their findings. Furthermore, although the plaintiff's attorney intimated that he would call the Headman who was available, as a witness on the date to which the case was then postponed, he failed to do so without giving any reason therefor which gives rise to an inference adverse to the plaintiff, viz., that the Headman would not bear out his version, see *Gleneagles Farm Dairy versus Schoombie* 1949 (1) S.A. 830 (A.D.), at page 840.

The Commissioner's finding that the defendant's witnesses confirmed that the plaintiff had described the beast at the defendant's kraal exactly as he had described it in Court, does not appear to accord with the evidence.

The defendant denied that he had looked for and claimed a beast in the plaintiff's herd as alleged by the plaintiff's witness Dalibunga. The fact that the defendant admitted that he found his ox on the grazing ground where the plaintiff lost his also does not advance the latter's case in the absence of proper identification by him and his witnesses of the ox. It follows that the probabilities cannot be said to favour the plaintiff's case so that the Commissioner was wrong in finding for him. As properly conceded by Mr. Airey there does not appear to be a balance of probabilities in the defendant's favour so that the Commissioner should have decreed absolution from the instance, with costs.

In the result the appeal should be allowed, with costs, and the judgment of the Bantu Affairs Commissioner's Court altered to one of absolution from the instance, with costs.

A further matter calls for comment. According to the Commissioner's notes of the proceedings, he adjourned the trial whilst the plaintiff was testifying to enable the parties to inspect the ox in dispute in the courtyard. There is nothing to indicate that the Commissioner was present at the inspection *in loco* as he should have been. If he did in fact attend the inspection, it was, as pointed out by Mr. Airey, incumbent on him then and there to make proper notes of his findings thereat and to communicate these to the parties to enable them to conduct their cases properly, see *Baba versus Lambese and Another* 1962 (2) P.H., R.26 (S.B.A.C.), cited by Mr. Airey. If the Commissioner did not attend the inspection, he failed in his duty as it was essential for him to do so for the proper elucidation of the evidence and solution of the case. There can be little doubt that an inspection *in loco* by him, with notes of his findings, would have obviated the present difficulties and resulted in the final determination of the case with the resultant saving of time and expense. This should be borne in mind by the Commissioner in future cases.

Yates and Hastie, Members, concurred.

For Appellant: Mr. F. G. Airey of Umtata.

For Respondent: Mr. R. Knopf of Umtata.

SOUTHERN BANTU APPEAL COURT.

NTLELWANA vs. KRAAI d.a.

N.A.C. CASE No. 8 OF 1962.

UMTATA: 25th January, 1963. Before Balk, President, Yates and Collen, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal from Chief's Court—recorded statements made by witnesses in Chief's Court relied upon by presiding judicial officer on appeal—considerations.

Summary: In an appeal from the judgment of a Chief's Court the notes of the statements made by the witnesses in the Chief's Court were annexed to the Chief's written record. The Bantu Affairs Commissioner compared these notes with the evidence given by the plaintiff in his (the Commissioner's) Court and took into account discrepancies between the two sets of evidence.

The following is an addendum by the President to the written judgment in this case, such written judgment not being material to this report: :—

"A further matter calls for comment. The notes of the statements made by the witnesses in the Chief's Court in this case are annexed to the Chief's written record. The Bantu Affairs Commissioner compared those notes with the evidence given by the plaintiff in his (the Commissioner's) Court and took into account discrepancies between the two sets of evidence. It was, however, not competent for him to have done so as, apart from the fact that the notes in question do not properly form part of the Chief's written record in the Commissioner's Court on appeal, see sections 6, 7 (1) and 10 (1) (*c*) of the regulations for Chief's and Headman's Civil Courts, and they do not appear to have been handed in by consent at the hearing of the appeal in the Commissioner's Court so that they were not then properly before the Commissioner, there is nothing to indicate that those notes were put in by agreement of the parties for the purpose for which they were used by the Commissioner; nor were the discrepancies in question put to the plaintiff in the course of his evidence in the Commissioner's Court and admitted by, or proved against him."

Cases referred to:

Schoble's Law of Evidence (Third Edition) at pages 372 to 373.

Yates and Collen, Members, concurred in the addendum by the President.

SOUTHERN BANTU APPEAL COURT.

MALIE AND ANO. vs. SHIBA.

N.A.C. CASE No. 7 OF 1962.

UMTATA: 30th January, 1963. Before Balk, President, Yates and Hastie, Members of the Court.

PRACTICE AND PROCEDURE.

Appeals from Bantu Affairs Commissioners' Courts—Rule 4 of Rules for Bantu Appeal Courts—period of fourteen days referred to commences to run from date written judgment delivered to clerk of court.

EVIDENCE.

Action for damages for seduction and pregnancy—proof of admission by alleged tort-feasor ousts necessity for other corroboration of girl's evidence and makes her failure to report her condition to her people of no moment. Witness testifying before party by whom called—evaluation of weight of such evidence.

NATIVE CUSTOM.

Basuto custom—seduction and pregnancy—not necessary under Basuto custom for taking of "stomach" to alleged seducer's kraal. Father's liability for delicts of son dictated by kraal-head responsibility.

Summary: This appeal was from a judgment for plaintiff (now respondent) as prayed, with costs, in an action in which he sued the two defendants (present appellants) for the customary Native law damages for the seduction and pregnancy of his sister, Patiwe, citing the second defendant as the tort-feasor and the first defendant as being liable on the ground that he was the second defendant's father and guardian.

The appeal was noted late and from the affidavits in support of the application for condonation of the late noting it appeared that the attorney for the appellant was under the erroneous impression that the period of fourteen days referred to in Rule 4 of the Rules of this Court commenced to run from the day on which he received the reasons for judgment.

The plaintiff and Patiwe gave evidence to the effect that the defendant had admitted at an enquiry before a headman that he had had sexual intercourse with Patiwe and rendered her pregnant. This evidence was denied by the defendant and his witnesses but accepted by the Court *a quo*. Patiwe failed to report her seduction and pregnancy to her people as she ought to have done consonant with custom.

Patiwe was called to give evidence for the plaintiff before the latter had testified. Plaintiff and Patiwe admitted that Patiwe's "stomach" had not been taken to the defendants' kraal and that the plaintiff had only reported her pregnancy there. It appeared that the plaintiff lived in a Basuto location and followed Basuto custom.

Held: That the period of 14 days referred to in Rule 4 of the Rules for Bantu Appeal Courts commenced to run from the date on which the written judgment is delivered by the presiding judicial officer to the clerk of the court and not from the date on which such written judgment is received by the attorney who made the written request therefor.

Held further: That in actions for damages for seduction and pregnancy proof of an admission by the defendant who is cited as tort-feasor that he had had sexual intercourse with the girl concerned and rendered her pregnant ousts all necessity for other corroboration of her evidence, and makes her failure to report her seduction and pregnancy to her people a matter of no moment.

Held further: That it is advisable for a party to give evidence before his witnesses as the weight of his evidence may otherwise be lessened. Where, however, the witnesses' evidence is confined to a bald statement of an event and the plaintiff's testimony in respect of it is given in great detail, much of which had been elicited under cross-examination and on the face of it bears the impress of truth, the fact that the witness gave evidence before the plaintiff did not detract from the latter's evidence.

Held further: That according to Basuto custom it is not necessary for the "stomach" to be taken to the alleged seducer's kraal but it suffices if the pregnancy be reported thereat.

Held further: That according to Native law a father is not liable for his son's delicts because of his relationship but on the ground of kraalhead responsibility, the test being whether the son was residing at his father's kraal at the time he committed the delict.

Cases refered to:

Msenge versus Ndzungu, 1962, (2) P.H., R. 28 (S.B.A.C.).
Rex versus Keller and Parker, 1914, C.P.D. 791, at page 793.
Moletsane versus The State, 1962, (1) S.A. 182 (E.C.D.).
Pakkies versus Fanyana, 1 N.A.C. (S.D.) 59.

Appeal from judgment of Bantu Affairs Commissioner's Court, Mount Fletcher.

Balk (President):

The matter initially dealt with by this Court in this case was an application for condonation of the late noting of the appeal. As it was manifest from the affidavits filed in support of the application that the delay in noting the appeal was entirely due to the negligence of the appellants' attorney of record in not posting the notice of appeal to the clerk of the Bantu Affairs Commissioner's Court concerned immediately on receipt of the Commissioner's reasons for judgment furnished in response to the attorney's written request and that the appellants were in no way to blame for the delay in that they had fully instructed the attorney to note the appeal on the same day as the Commissioner had given the judgment and the delay amounted only to three days, this Court, following its previous decisions, see *Gundwana versus Sitchinga* 1961, N.A.C. 40 (S) and the authority there cited, condoned the late noting. It should be added that it would appear from the supporting affidavit that the attorney was under the erroneous impression that the period of fourteen days referred to in Rule 4 of the rules of this Court commenced to run from the day on which he received the reasons for judgment i.e. from the 26th February, 1962, instead of from the 15th idem this being the date on which the reasons were delivered by the Commissioner to the clerk of the court which in terms of Rule 4 is the criterion. There is little excuse for the attorney's error here base, as it obviously is, on his failure to refer to the rules.

The appeal is from the judgment for plaintiff (now respondent) as prayed, with costs, in an action in which he sued the two defendants (present appellants) for the customary Native law damages for the seduction and pregnancy of his sister, Patiwe, citing the second defendant as the tort-feasor and the first defendant as being liable on the ground that he was the second

defendant's father and guardian. Here it should be mentioned that in Native law a father is not liable for his son's delicts because of his relationship but on the ground of kraalhead responsibility, the test being whether the son was residing at his father's kraal at the time he committed the delict, see *Msenge versus Ndzungu* 1962, (2) P.H., R.28 (S.B.A.C.). Nothing, however, turns on this point in the instant case as the defendants admitted in their plea that the first defendant was liable for the second defendant's torts.

The defendants denied in their plea that the second defendant had seduced and rendered Patiwe pregnant so that the onus in this respect rested on the plaintiff.

The appeal is brought on the following grounds:—

" 1. That the judgment is against the weight of evidence, is not supported thereby and is bad in law.
2. That the Presiding Judicial Officer erred in finding that the evidence of Patiwe Shiba was corroborated by the Plaintiff who stated that Defendant No. 2 had admitted the seduction to him and in the Headman's Court inasmuch as Plaintiff failed to prove the said admissions.
3. That the evidence of Plaintiff apart from being confused and of little consequence was also of negligible value and of no weight as Plaintiff was present in Court when Patiwe gave evidence and the Presiding Judicial Officer should have had little reliance on it."

There is, as stressed by Mr. Airey in his argument on behalf of the appellant, this unsatisfactory feature in the plaintiff's case that Patiwe failed to report her seduction and pregnancy to her people as she ought to have done consonant with custom.

There is this further factor that, according to Patiwe, no third person was aware of her intimacy with the second defendant until her pregnancy was discovered by her people and she disclosed that the second defendant was responsible therefor.

However, as submitted by Mr. Muggleston, these aspects fall to be considered in conjunction with the question whether the plaintiff established that the second defendant had admitted at the enquiry before the Headman that he had had sexual intercourse with Patiwe and rendered her pregnant; for such an admission would oust the necessity for other coroboration of Patiwe's evidence that the second defendant had seduced and rendered her pregnant and would make her failure to report her seduction and pregnancy to her people a matter of no moment.

Both the plaintiff and Patiwe testified to this admission which was denied by the second defendant and his witness, the Headman, in their evidence. As contended by Mr. Muggleston, the Bantu Affairs Commissioner gives cogent reasons for accepting the evidence for the plaintiff that the second defendant had in fact made the admission for, as pointed out by the Commissioner, apart from the Headman's persistent evasiveness in the course of his testimony, his evidence that he did not make the award of cattle against the second defendant at his enquiry is shown to be false by the second defendant's ultimate admission under cross-examination that the Headman had in fact made such an award; and the second defendant's evidence also falls to be regarded as unreliable as he denied in his evidence-in-chief that such an award had been made.

Admittedly, the Commissioner should not have held against the second defendant his initial admission that one of the letters (Exhibits " A ", " B " and " C ") was produced at the Headman's enquiry followed by his denial that it was one of these letters as by his initial admission he may well have intended to convey no more than that a letter similar to those before the Court (Exhibits " A ", " B " and " C ") was produced when the matter

was enquired into by the Headman. But this misdirection does not militate against the success of the plaintiff's case as the Commissioner was justified in accepting the evidence for the plaintiff and rejecting that for the defendant for the reasons given above.

It is true that where a witness, whilst waiting to give evidence for the party who called him, remains in Court whilst other witnesses for the same party are testifying, it may lessen the weight of his evidence, see *Rex. versus Keller and Parker,* 1914, C.P.D. 791, at page 793 and *Moletsane versus The State,* 1962, (1) S.A. 182 (E.C.D.), so that in general it is advisable for a party to give evidence before his witnesses. The fact that here the plaintiff's witness, Patiwe, testified before the plaintiff so that the latter heard her evidence before testifying himself does not, in my judgment, detract from his evidence anent the second defendant's admission of the alleged seduction and pregnancy at the Headman's enquiry for, as submitted by Mr. Muggleston, Patiwe's evidence is confined to a bald statement of the alleged admission by the second defendant whereas the plaintiff's testimony in this respect is given in great detail much of which was elicited under cross-examination and on the face of it bears the impress of truth.

As regards the admission by the plaintiff and Patiwe in the course of their evidence that her "stomach" was not taken to the defendant's kraal and that the plaintiff had only reported her pregnancy there, it would appear on a proper construction of the plaintiff's evidence that, although he stated he was a Pondomise and practised Pondomise custom, he lived in a Basuto location and in fact followed Basuto custom so that his having reported Patiwe's pregnancy instead of having taken her "stomach" cannot be regarded as a departure from custom, see *Pakkies versus Fanyana,* 1 N.A.C. (S.D.) 59.

In the result the appeal should be dismissed, with costs.

Yates and Hastie, Members, concurred.

For Appellant: Mr. F. G. Airey of Umtata.

For Respondent: Mr. K. Muggleston of Umtata.

SOUTHERN BANTU APPEAL COURT.

KEWANA vs. NKUZO.

N.A.C. CASE No. 43 OF 1962.

KING WILLIAM'S TOWN: 26th February, 1963. Before Balk, President, Yates and Oscroft, Members of the Court.

PRACTICE AND PROCEDURE.

Application for postponement of hearing of action—attorney making application on ground of non-appearance of client and witnesses—no explanation given for such non-appearance.

Summary: The trial of this action in the Bantu Affairs Commissioner's Court commenced on the 18th September, 1962, when the plaintiff and one of his witnesses gave evidence. The hearing was thereupon postponed to the 5th October, 1962. At the resumed hearing on that date a further witness for the plaintiff was called and at the conclusion of his evidence, the plaintiff's case was closed. The defendant's

attorney thereupon applied for a postponement intimating that his client and the latter's witnesses had not yet arrived. He was unable to give any reason for their failure to do so. This application was opposed by the plaintiff's attorney and refused by the court. Plaintiff's attorney thereupon applied for judgment for plaintiff as prayed, with costs, which was granted. Defendant appealed to this Court against the Bantu Affairs Commissioner's refusal to grant the postponement applied for.

Held: That in the circumstances of the instant case it could not be said that the presiding Bantu Affairs Commissioner did not exercise a judicial discretion in refusing the application for a postponement.

Cases referred to:

Madnitsky versus Rosenberg, 1949, (2) S.A. 392 (A.D.), at page 399.

Appeal from the judgment of the Bantu Affairs Commissioner's Court, Lady Frere.

Balk (President):

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court for plaintiff (now respondent) as prayed. with costs, in a certain civil action brought by him against the defendant (present appellant).

The appeal is brought on the following grounds:—

" 1. That the Assistant Bantu Affairs Commissioner did not exercise his discretion in a fair and reasonable manner, when he refused the Application of the Appellant for a postponement in order to lead his evidence in support of his Plea.

2. That by refusing the said Application the Appellant has been unduly penalised and prejudiced.

3. That in view of the unconvincing evidence led by the Respondent and especially that of the witness Bonakele Moyake, it is urged that the prospects of the Appellant succeeding on his Plea were reasonably good.

4. That there would have been no prejudice to the Respondent if the said application had been granted. The Assistant Bantu Affairs Commissioner could have ordered the Appellant to pay the wasted costs, which the Appellant's Attorney indicated the Appellant would be prepared to pay.

5. That in view of the fact that there had already been several postponements, one at the instance of the Respondent, the Assistant Bantu Affairs Commissioner should have granted the Appellant the indulgence sought."

The trial of this action in the Bantu Affairs Commissioner's Court commenced on the 18th September, 1962, when the plaintiff and one of his witnesses gave evidence. The hearing was thereupon postponed to the 5th October, 1962. At the resumed hearing on that date, a further witness for the plaintiff was called and at the conclusion of his evidence, the plaintiff's case was closed.

The defendant's attorney thereupon applied for a postponement intimating that his client and the latter's witnesses had not yet arrived. He was unable to give any reason for their failure to do so.

This application was opposed by the plaintiff's attorney and refused by the court.

The plaintiff's attorney thereupon applied for judgment for plaintiff as prayed, with costs, which was granted.

As laid down in *Madnitsky versus Rosenberg,* 1949, (2) S.A. 392 (A.D.), at page 399, a court should be slow to refuse to grant a postponement where the reason for a party's unpreparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice demands he should be given further time for the purpose of presenting his case.

In the instant case there was no explanation whatsoever for the absence of the defendant and his witnesses at the resumed hearing so that applying the principles underlying the requisites set out above, it cannot be said that the presiding Assistant Bantu Affairs Commissioner did not exercise a judicial discretion in refusing the application for a postponement.

There is nothing to indicate that the defendant was penalised or prejudiced by such refusal.

It follows that the first and second grounds of appeal fail and that the remaining grounds fall away as they are not, in the circumstances, relevant.

The appeal should accordingly be dismissed, with costs.

Yates and Oscroft, Members, concurred.

For Appellant: Mr. H. J. C. Kelly, of Lady Frere.

For Respondent: No appearance.

SOUTHERN BANTU APPEAL COURT.

TUMANA vs. MILA AND ANO.

N.A.C. CASE No. 40 OF 1962.

UMTATA: 25th January, 1963. Before Balk, President, Yates and Collen, Members of the Court.

NATIVE CUSTOM.

Locus standi in judicio—*action for damages for seduction and pregnancy—under Native law action should be brought by girl's "dowry eater". Kraalhead responsibility—not competent to maintain action against kraalhead without joining tort feasor.*

Summary: Plaintiff appealed to this Court against the judgment of a Bantu Affairs Commissioner's Court, dismissing, with costs, an appeal by the plaintiff (present appellant) from the judgment of a Chief's Court dismissing plaintiff's claim against the two defendants for five head of cattle or their value, R100, as damages for the seduction of his granddaughter, Nontlabo, by the first defendant resulting in her pregnancy. The second Defendant was cited as being responsible for the torts of the first defendant.

The "eater" of Nontlabo's dowry was her father who was still alive.

During the course of the proceedings in the Bantu Affairs Commissioner's Court the plaintiff withdrew the claim against the first defendant.

Held: That the Plaintiff had no *locus standi in judicio* as according to Native law the proper person to maintain the action was the " eater " of Nontlabo's dowry, viz., her father, and this position would obtain even if she had, consonant with custom, been handed over to her paternal grandmother, i.e. to the plaintiff's wife.

Held further: That the Bantu Affairs Commissioner could not validly have found for the plaintiff as against the second defendant as it is not competent to maintain an action against a kraalhead without joining the tort-feasor.

Cases referred to:

Msenge versus Ndzungu, 1962 (2), P.H., R.28 (S.B.A.C.).
Mngcangceni versus Ndlangisa, 1959, N.A.C. 34 (S), at pages 37 and 38.

Appeal from judgment of Bantu Affairs Commissioner's Court, Cala.

Balk (President):

This action had its inception in a Chief's Court in which the plaintiff's claim against the two defendants for five head of cattle or their value, R100, as damages for the seduction of his granddaughter, Nontlobo, by the first defendant resulting in her pregnancy, was dismissed.

An appeal by the plaintiff from that judgment to the Bantu Affairs Commissioner's Court was dismissed, with costs.

The appeal to this Court from the judgment of the Bantu Affairs Commissioner's Court is brought by the plaintiff on the following grounds:—

" (1) That the Judgment is against the weight of evidence and contrary to recognised custom and law as practiced among the Tembus.
(2) That the presiding officer erred in concluding that the kraalhead is liable only if he is related to the ward and/or inmate as in Native Law the kraalhead is liable irrespective of the extent of his relationship to the ward and/or inmate."

This appeal must fail for a variety of reasons.

In the first place, as pointed out by the Bantu Affairs Commissioner in his reasons for judgment, the plaintiff has no *locus standi in judicio* as, according to the legal system obtaining in the instant action, i.e. Native law, the proper person to maintain the action is the " eater " of Nontlabo's dowry, viz., her father; and this position would obtain even if she had consonant with with custom, been handed over to her paternal grandmother, i.e. to the plaintiff's wife, to be brought up which is suggested by, but is not clear from, the evidence.

As also pointed out by the Commissioner in his reasons for judgment, there is no evidence that the first defendant seduced and rendered Nontlabo pregnant so that the claim against the second defendant must fail in any event bearing in mind that the alleged seduction and pregnancy was not admitted by him in his plea and the onus of proof in this respect, therefore, rested on the plaintiff.

Then, according to the second defendant's uncontroverted evidence, the first defendant was not residing at his (second defendant's) kraal at the time it is averred that Nontlabo was seduced and rendered pregnant so that the second defendant could not be held liable for damages therefor as in the instant case this liability can only flow from kraalhead responsibility and such responsibility is contingent upon the tort feasor having been resident at the kraalhead's kraal at the time of the commission of the tort, see *Msenge versus Ndzungu,* 1962 (2), P.H. R.28 (S.B.A.C.).

Again, the Bantu Affairs Commissioner's Court could not validly have found for the plaintiff as against the second defendant as in that Court the plaintiff withdraw the claim against the first defendant who was the alleged tort feasor, and it is not competent to maintain an action against a kraalhead without joining the tort feasor, see *Nngcangceni versus Ndlangisa,* 1959, N.A.C. 34 (S), at pages 37 and 38; and this position is not affected by the fact that the claim against the first defendant was withdrawn in the Commissioner's Court as the effect thereof is to eliminate that claim wholly from the case.

The appeal, accordingly, falls to be dismissed, with costs.

Yates and Collen, Members, concurred.

For Appellant: In person.

For Respondent: Mr. F. G. Airey of Umtata.

SOUTHERN BANTU APPEAL COURT.

YOKWANA vs. BOLSIKI.

N.A.C. CASE No. 35 OF 1962.

KING WILLIAM'S TOWN: 25th February, 1963. Before Balk, President, Yates and Oscroft, Members of the Court.

MAINTENANCE.

Liability of mother and natural father of illegitimate child for its maintenance. Arrear maintenance.

Summary: This was an appeal from a decree of absolution from the instance, with costs, by a Bantu Affairs Commissioner's Court in an action in which the plaintiff (present appellant) sued the defendant (now respondent) for maintenance for her illegitimate child by him at the rate of R4 per month plus arrear maintenance in the sum of R24 in respect of a period which extended from six months prior to the issue of the summons.

In this case the Court held that:—

(1) The burden of supporting an illegitimate child is one common to its mother and natural father according to their means.

(2) The claim for arrear maintenance for the period of six months preceding the issue of the summons was timeous and should accordingly be granted.

Cases referred to:

Davies versus Rex, 1909 (E.D.L.D.) 149, at page 155.
Ngwane versus Vakalisa, 1960, N.A.C. 30 (S), at page 32.

The appeal was allowed, with costs, and the judgment of the Bantu Affairs Commissioner's Court was altered to one for plaintiff as prayed, with costs.

For Appellant: Mr. H. Cohen, of East London.

For Respondent: Mr. D. Z. Popo, of East London.

SOUTHERN BANTU APPEAL COURT.

DZANIBE vs. DLAMINI.

N.A.C. CASE No. 42 OF 1962.

UMTATA: 31st January, 1963. Before Balk, President, Yates and Hastie, Members of the Court.

PRACTICE AND PROCEDURE.

Appeals from Bantu Affairs Commissioner's Courts—application for condonation of late noting of appeal—advisable for merits of case to be put in issue—where such merits not put in issue explanation for delay should be sufficiently full to show "just cause" within meaning of Rule 4 of Rules for Bantu Appeal Courts.

Summary: In his affidavit in support of an application for condonation of the late noting of the appeal the attorney for the applicant alleged that he had typed out the notice of appeal on the 19th September, 1962, but the original and the copy for service on the respondent were misplaced by the clerk in his office. He believed that the notice of appeal had been duly served on the respondent's attorney and on the clerk of the Bantu Affairs Commissioner's Court until the 1st October, 1962, when these documents were found in his office and service was attempted.

The notice of appeal filed with the clerk of the Bantu Affairs Commissioner's Court, and transmitted to this Court, was dated the 5th October, 1962. No indication was given as to what had become of the notice of appeal, dated the 19th September, 1962, nor why it had not been used when it was found in the attorney's office on the 1st October, 1962, instead of the notice dated the 5th October, 1962. The merits of the proposed appeal were not put in issue by either of the parties.

Held: That ordinarily and especially so when the explanation for the late noting of the appeal leaves a great deal to be desired, it is advisable that the applicant should furnish in his affidavit, briefly and succinctly and without argument the essential information to enable the Court to decide the prospects of success of the proposed appeal for this factor may be decisive.

Held further: That as the applicant had not furnished an adequate explanation for the delay in noting the appeal, i.e. sufficiently full to enable the Court to assess his conduct and motives, and the merits of the proposed appeal had not been relied upon by him, he was held not to have shown "just cause" within the meaning of Rule 4 of the Rules for Bantu Appeal Courts and the application for condonation of the late noting was refused.

Cases referred to:

Slomowitz versus Town Council of Vanderbijlpark, 1962 (1), P.H., F.36 (T.P.D.).

Silber versus Ozen Wholesalers (Pty.), Ltd., 1954 (2) *S.A.* 345 (A.D.) at pages 352 to 353.

Meintjies versus H. D. Combrinck (Edms.), Bpk., 1961 (1), S.A. 262 (A.D.) at pages 264 to 265.

De Villiers versus de Villiers, 1947 (1), S.A. 635 (A.D.), at page 637.

Appeal from judgment of Bantu Affairs Commissioner's Court, Umzimkulu.

Balk (President):

This is an application for condonation of the late noting of an appeal from the judgment of a Bantu Affairs Commissioner's Court in a certain civil action.

Mr. Knopf in his argument on behalf of the applicant submitted that, consonant with the decisions of this Court, the application ought to be granted by it as the applicant's attorney and not the applicant was to blame for the delay in noting the appeal. That there are such decisions is apparent from the judgment in *Gundwana versus Sitchinga,* 1961, N.A.C. 40 (S), at page 41, and the authority there cited.

Mr. Airey who appeared in this Court on behalf of the respondent, opposed the application on the ground that the applicant's explanation for the default was defective.

Two affidavits were filed in support of the application, viz., one by the applicant and the other by his attorney of record.

Whilst it is implicit in the applicant's affidavit that he instructed his attorney to note an appeal, the date on which he did so is not disclosed therein.

According to the attorney's affidavit, the applicant instructed him to note an appeal on the 30th August, 1962, this being the day after that on which the judgment was delivered. The attorney goes on to state that on the same day as he was instructed to note the appeal, he made a request for the Bantu Affairs Commissioner's reasons for judgment, including the facts found proved by him, which he received on or about the 11th September, 1962. On the 19th September, 1962, he typed out the notice of appeal but the original and the copy for service on the respondent were misplaced by the clerk in his office. He believed that the notice of appeal had been duly served on the respondent's attorney and on the clerk of the Bantu Affairs Commissioner's Court until the 1st October, 1962, when these documents were found in his office and service was attempted.

Why service was then only attempted and not effected is inexplicable as the attorney was, on his own showing, aware of the name and address of the respondent's attorney of record. This is, however, not the only unexplained feature. On reference to the notice of appeal filed with the clerk of the Commissioner's Court and transmitted to this Court, it was observed that it is dated the 5th October, 1962.

There is no explanation indicating what became of the notice of appeal dated the 19th September, 1962, nor why it was not used when it was found in the attorney's office on the 1st October, 1962, instead of the notice, dated the 5th October, 1962. Mr. Knopf intimated that he was unable to enlighten this Court in this connection.

It follows that the applicant did not furnish an explanation sufficiently full to enable this Court to assess his conduct and motives. Such an explanation was essential to show "just cause" within the meaning of Rule 4 of the Rules of this Court for the granting of the indulgence sought as here the merits of the proposed appeal were not relied upon by the applicant, see *Slomowitz versus Town Council of Vanderbijlpark,* 1962 (1), P.H., F.36 (T.P.D.) and the first authority there cited viz., *Silber versus Ozen Wholesalers (Pty.), Ltd.,* 1954 (2), S.A. 345 (A.D.), at pages 352 and 353;; see also *Meintjies versus H. D. Combrinck (Edms.), Bpk.,* 1961 (1) S.A. 262 (A.D.), at pages 264 and 265.

As the merits of the proposed appeal were not put in issue by either of the parties, they do not call for consideration, see *de Villiers versus de Villiers,* 1947 (1), S.A. 635 (A.D.), at page 637. In this connection attention is invited to the judgment in *Meintjies'* case (*supra*), at page 265, indicating that ordinarily at any rate and especially where the tendered explanation leaves a great deal to be desired, it is advisable that the essential information be furnished by the applicant in his affidavit, briefly and succinctly, without verbosity or argument, to enable the Court to decide what prospects of success there are in the proposed appeal for this is a consideration which can be a deciding factor.

In the result the application should be refused, with costs.

Yates and Hastie, Members, concurred.

For Applicant: Mr. R. Knopf of Umtata.

For Respondent: Mr. F. G. Airey of Umtata.

NORTH-EASTERN BANTU APPEAL COURT.

JIYANE vs. JIYANE.

B.A.C. CASE No. 16 OF 1962.

ESHOWE: 27th November, 1962. Before Craig, Acting President; Parsons and Colenbrander, Members of the Court.

PRACTICE AND PROCEDURE.

Time within which appeal to be noted from Chief's court to that of Bantu Affairs Commissioner.

Summary: A chief gave judgment on 13th May, 1960, and an appeal therefrom was noted on 13th July, 1960.

Held: That the appeal was out of time and in the absence of condonation the Bantu Affairs Commissioner had no right to proceed with the hearing.

Cases referred to:

Dhlamini versus Mdhluli, 1948, N.A.C. 33 (N.E.).
Joubert versus Enslin, 1910, A.D. 6.
Napier versus Napier, 1947 (4), S.A.L.R. 642.

Rules referred to:

Bantu Appeal Court rules 5 and 6.
Chief's Court rule 9.

Appeal from judgment of Bantu Affairs Commissioner, Eshowe.

Craig, Acting President:

The plaintiff instituted an action against defendant in a chief's court as follows:

> "Claiming Defendant 33 goats, 49 head of cattle which kept in deferent kraals and 26 head of cattle were at his father's kraal when he died and 6 were given to Defendant and the property deceased father."

Defendant's "Particulars of Defence" are recorded as:

> "Denys the claim that all the cattle belong to him not of deceased father all been bought and paid by him."

The Chief's judgment on this claim for stock and property is recorded as:

> "For Plaintiff all the property of the deceased father as an heir."

This somewhat evasive judgment which made no award of costs, was taken on appeal to the Bantu Affairs Commissioner who, without the benefits of an amplification of claim, plea, counter-claim and replication (*vide Dhlamini versus Mdhluli,* 1948, N.A.C. 33) proceeded to hear the case. The matter before the court appears to have changed its complexion on the way and eventually the Commissioner gave a judgment which awarded certain stock to defendant and ignored plaintiff except to order him to pay the costs. The Commissioner appears to have overlooked the fact that this was an appeal.

This judgment has become the subject of appeal and cross-appeal which *ex facie* the record seem to be characterised by a disregard of rules 5 and 6 of the Bantu Appeal Courts. (Government Notice No. 2887 of 1951.) It appears though from the submissions of Mr. Wynne, who appeared for the respondent, that the record is incomplete.

The court, *mero motu,* raised the point that the appeal from the chief's court was noted out of time. The chief's judgment was given on 13th May, 1960, and the "Notice of Hearing of Appeal against the judgment of a Chief's Court" was according to the typewritten words and figures therein, issued on 13th July, 1960. The significance of the fact that the stamp on this document was only cancelled on 16th July, 1960, is not readily apparent.

Be that as it may, according to the general rule laid down by the Appellate Division in *Joubert versus Enslin,* 1910, A.D. 6 and followed in numerous cases including *Napier versus Napier,* 1947 (4), S.A.L.R. 642 the time for noting the appeal in this case expired at midnight on 12th July, 1960.

There was no application for or grant by the Commissioner of Condonation as provided for by rule 9 of the rules for Chief's Courts and he had no right to proceed with the hearing of the appeal as it was not properly before him.

The appeal must succeed but as the point on which it turns was not raised in the court below neither party is entitled to costs.

The appeal will be allowed and all proceedings in the Bantu Affairs Commissioner's Court subsequent to the issue of the Notice of Hearing N.A. 503 will be set aside. There will be no order as to costs.

Parsons and Colenbrander, Members, concur.

For Appellant: Mr. F. P. Behrmann (Davidson & Schreiber).

For Respondent: Mr. B. Wynne (Wynne & Wynne).

SOUTHERN BANTU APPEAL COURT.

GOVUZA AND ANO. vs. MATUNTUTA.

N.A.C. CASE No. 30 OF 1962.

KING WILLIAM'S TOWN: 25th February, 1963. Before Balk, President, Yates and Oscroft, Members of the Court.

PRACTICE AND PROCEDURE.

Summons commencing action—Bantu Affairs Commissioner's Courts—absence of averment in summons that both parties are Natives as defined in Act No. 38 of 1927—implications thereof—question of incidence of onus of proof whether court has jurisdiction.

Summary: This was an appeal from the judgment of a Bantu Affairs Commisioner's Court refusing, with costs, an application brought by the two defendants (present appellants) for the rescission of the default judgment given by that Court for the plaintiff (now respondent) as prayed, with costs, in an action he brought against them for damages based on negligence.

The appeal was brought on the following grounds:—

"1. That the Assistant Bantu Affairs Commisioner erred in dismissing the Defendants' application to have the default judgment against them set aside, by reason of the fact that the said judgment was *void ab origine* inasmuch as there is no averment in plaintiff's particulars of claim that the parties thereto are Natives as defined by Act No. 38 of 1927, and consequently the Court had no jurisdiction.

2. That in any event, the Assistant Bantu Affairs Commissioner erred in law:—

(*a*) In holding that the mere presence of the words "a Native" on the face of the summons confers jurisdiction on the Court to adjudicate without the specific allegation in the particulars of claim that the parties are Natives as defined by Act No. 38 of 1927.

(*b*) In holding that the application was not timeously made, inasmuch where the application is based on the ground of the invalidity of the judgment the provisions of rule 74 (9) of the Native Commissioners' Courts' Rules apply, and in terms thereof, the defendants' application was timeous."

Held: That there is no necessity for an averment in a summons that the parties to an action are Natives as defined in the Native Administration Act, 1927, as amended, as an indication that the court has jurisdiction in so far as the provision in subsection (1) of section *ten* of the Act limiting the hearing of civil matters in Bantu Affairs Commissiones' Courts to those between Natives, is concerned.

Held further: That the presiding judicial officer was entitled to rely on the description of the parties as reflected on the face of the summons on the matter going by default in the absence of a plea by the defendants which left the statement that the parties were Natives unchallenged.

Held further: That in any event the mere absence of an averment of the nature in question from a summons, even if obligatory, could not in itself render the judgment void in the absence of a statutory provision to that effect. What was required for the judgment in such a case to be held to be void was proof, which was lacking here, that one or the other of the parties to the action was not a Native as defined in the Act so that the court had no jurisdiction.

Held further: That as regards the question of the incidence of the onus of proof whether a court has jurisdiction, the position is that it is the province of the plaintiff to establish the jurisdiction of the court into which he, as *dominus litis,* has brought the defendant and in this sense the onus of establishing jurisdiction is always on the plaintiff, but the form of the defendant's plea may be such as to burden him with an onus to prove certain facts.

Cases referred to:

Licences and General Insurance Co. versus Bassano, 1936, C.P.D. 179 at page 183.

Ngqoyi versus Da Conciecao, 1946, N.A.C. (N. & T.) 49.

Nkwanyana versus Nene, 1, N.A.C. (N.E.) 294.

Malherbe versus Britstown Municipality, 1949 (1), S.A. 281 (C), at pages 287 to 288.

Munsamy versus Govender, 1950 (2), S.A. 622 (N.).

Korsten African Ratepayers Association versus Petane, 1955, N.A.C. 136 (S), at page 141.

Wyatt versus Wyatt, 1956, N.A.C. 119 (S.N.D.C.), at page 120.

Appeal from judgment of Bantu Affairs Commissioner's Court, East London.

Balk (President):

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court refusing, with costs, an application brought by the two defendants (present appellants) for the rescission of the default judgment given by that Court for the plaintiff (now respondent) as prayed, with costs, in an action he brought against them for damages based on negligence.

The appeal is brought on the following grounds:—

"1. That the Assistant Bantu Affairs Commissioner erred in dismissing the defendants' application to have the default judgment against them set aside, by reason of the fact that the said judgment was *void ab origine* inasmuch as there is no averment in plaintiff's particulars of claim that the parties thereto are Natives as defined by Act No. 38 of 1927, and consequently the Court had no jurisdiction.

2. That in any event, the Assistant Bantu Affairs Commissioner erred in law:—

(*a*) In holding that the mere presence of the words "a Native" on the face of the summons confers jurisdiction on the Court to adjudicate without the specific allegation in the particulars of claim that the parties are Natives as defined by Act No. 38 of 1927.

(*b*) In holding that the application was not timeously made, inasmuch where the application is based on the ground of the invalidity of the judgment the provisions of rule 74 (9) of the Native Commissioners' Courts' Rules apply, and in terms thereof, the defendants' application was timeous."

Apart from the provision in paragraph (*f*) of rule 33 (7) of the rules for Bantu Affairs Commissioners' Courts that the summons shall contain an averment that the whole cause of action arose within the area of the court's jurisdiction if this factor is relied upon to found jurisdcton, there is, as pointed out by Mr. Heathcote in his argument for the respondent, nothing in that rule or in rule 32, which set out the requirements of a summons, or elsewhere in the rules providing for any statement of jurisdiction therein; nor is there any such provision in the Native Administration Act, 1927, as amended, under which Bantu Affairs Commissioners' Courts are constituted and the rules for such courts made. Consequently, there appears to be no necessity for an averment in a summons that the parties to an action are Natives as defined in the Native Admiinstration Act, 1927, as amended, as an indication that the court has jurisdiction in so far as the provision in sub-section (1) of section *ten* of the Act limiting the hearing of civil matters in Bantu Affairs Commissioners' Courts to those between Natives, is concerned. This view gains support from the judgment in *Licences and General Insurance Co. versus Bassano,* 1936 (C.P.D.)179, at page 183. It is true that, as pointed out at that page, there are decisions that in respect of an inferior court a statement must be made averring jurisdiction in the court. But, as also pointed out at the same page, the aspect dealt with there and here relied upon, viz., that an averment of the nature in question is not a requirement of the rules, was not gone into in those cases so that they cannot be regarded as an authority in the instant case. It is also true that items 1 and 2 of Form No. 6 entitled "Endorsement of Claim on Summons" in the First Annexure to the rules at page 56 include an averment that the parties to the action are Natives as defined by the Native Administration Act, 1927. But, as submitted by Mr. Heathcote, this does not affect the position here as the averments there are made not to indicate that the court has jurisdiction but to found claims based on Native law and custom as is evident from the fact that there is no such averment in the remaining items in the form where, as here, the claims are based on common law. In any event, as is apparent from the note at the head of the form and from rule 97 (1), the form merely serves as an example and non-compliance therewith does not constitute a ground for exception.

Mr. Popo, in his argument on behalf of the appellant, relied on the *dictum* in *Ngqoyi versus Da Conciencao,* 1946, N.A.C. (N. & T.) 49, that it is incumbent upon a litigant to aver in his summons that both he and the defendant are Natives. There is a similar *dictum* in *Nkwanyana versus Nene,* 1, N.A.C. (N.E.) 294. But, with respect, those *dicta* ought not to be followed for the reasons given above.

As regards the question of the incidence of the onus of proof whether a court has jurisdiction, dealt with in *Ngqoyi's* case, the position is, with respect, as set out in the following passage from the judgment in *Malherbe versus Britstown Municipality,* 1949 (1), S.A. 281 (C), at pages 287 and 288, which was followed in *Munsamy versus Govender,* 1950 (2), S.A. 622 (N):—

> "It is the province of the plaintiff to establish the jurisdiction of the Court into which he, as *dominus litis,* has brought the defendant. In this sense the onus of establishing jurisdiction is, in my view, always on the plaintiff. But the form of defendant's plea may be such as to burden him with an onus to prove certain facts. As shown by van den Heever, J. P. (as he then was) in *Lubbe versus Bosman,* 1948 (3), S.A. 909 (O.P.D.) at page 915, there is weighty Roman-Dutch authority for the proposition that once a defendant raises the *exceptio fori declinatoria* as a substantive plea 'the onus rests upon him of proving the facts upon which his plea to the jurisdiction is based.' In such a case the defendant in his plea avers the existence of certain facts which, if proved, will defeat the jurisdiction. The onus of proof of

such facts rests upon the defendant. Where however the plaintiff in his summons [either as originally filed or as augmented by the particulars contemplated by rule 10 (8) (vi) (Magistrates' Courts)] avers facts which, if proved, establish jurisdiction on the ground of the whole cause of action having arisen within the district, and the defendant's plea merely puts those facts in issue, then the onus remains with the plaintiff to prove both the facts which he avers and the conclusion (viz., that the whole cause of action arose within the district) which he deduces therefrom. In such a case, in the words of van den Heever, J.P., in *Lubbe versus Bosman* (*supra,* at p. 915), 'the onus will continue to burthen the plaintiff.'"

Even if an averment in a summons that the parties to the atcion are Natives were a *sine qua nou* for the purpose of indicating that the court had jurisdiction, the parties to the instant action are described as Natives on the face of the summons which is adequate for that purpose and on which the presiding Assitant Bantu Affairs Commissioner was entitled to rely on the matter going by default in the absence of a plea by the defendants which left the statement that the parties are Natives unchallenged, see *Korsten African Ratepayers Association versus Petane,* 1955, N.A.C. 136 (S), at page 141. Admittedly, it is not stated in the summons that the parties fall within the definition of "Native" in the Native Administration Act, 1927. This is, however, a matter of no moment as the word "Native" as ordinarily understood means a member of an aboriginal race or tribe of Africa and so is included in the definition of "Native" in section *thirty-five* of the Act, see *Wyatt versus Wyatt,* 1956, N.A.C. 119 (S.N.D.C.), at page 120.

In any event, the mere absence of an averment of the nature in question from a summons, even if obligatory, cannot in itself render the judgment void in the absence of a statutory provision to that effect. What is required for the judgment in such a case to be held to be void is proof, which is lacking here, that one or the other of the parties to the action is not a Native as defined by the Act so that the court has no jurisdiction.

It follows that there is no substance in grounds of appeal 1 and 2 (*a*) and that the remaining ground of appeal falls away based, as it is, on the foregoing grounds.

The appeal should accordingly be dismissed, with costs.

Yates and Oscroft, Members, conferred.

For Appellant: Mr. D. Z. Popo of East London.

For Respondent: Mr. E. Heathcote.

NORTH-EASTERN BANTU APPEAL COURT.

NGCOBO vs. RADEBE.

B.A.C. CASE No. 42 OF 1962.

PIETERMARITZBURG: 19th November, 1962. Before Cowan, President, Craig and Botha, Members of the Court.

PRACTICE AND PROCEDURE.

Rule 54 (*a*) *and* (*b*)*—Bantu Affairs Commissioner's Courts—compliance with.*

Summary: Plaintiff sued defendant for £35 alleging undue enrichment. Plaintiff testified stating defendant had taken and sold his beast without cause. Defendant did not testify or call evidence. The Bantu Affairs Commissioner gave judgment for **Defendant with costs.**

Held: That as plaintiff had established a *prima facie* case a judgment for defendant was not competent.

Held further: That as the essence of plaintiff's case was "undue enrichment" and that he had not proved it he was not entitled to a final judgment.

Statutory References:

Bantu Affairs Commissioner's Court rules 54 (*a*) and (*b*).

Appeal from judgment of the Bantu Affairs Commissioner at Harding.

Craig, Permanent Member:

In the Bantu Affairs Commissioner's court the plaintiff claimed £35 from defendant alleging that the latter had been unjustly enriched to that extent at his expense.

It appears from the summons that the present defendant was plaintiff in a chief's court in another case and was given judgment for £1. 2s. 6d. against one Julius Ngcobo, the cousin of present plaintiff; that thereafter present defendant caused a tribal messenger to attach and sell present plaintiff's beast to settle the debt due by Julius.

Defendant in his plea admitted that he had obtained a judgment against Julius for £1. 12s. 6d. and costs but denied the other allegations and put plaintiff to the proof of them.

The Bantu Affairs Commissioner gave judgment for defendant with costs and plaintiff appealed to this Court as follows:—

"1. That the judgment is bad in law by reason of the fact that as Defendant never led evidence a final judgment should not have been decreed; the proper judgment should have been that of *Absolution from the Instance* thereby affording the aggrieved party an opportunity for redress.

2. The judgment is bad in law in that the Court disregard the principle of enrichment at the expense of another.

3. The Plaintiff herein applies for condonation of the late filing of appeal due to the fact that application was made to the Native Commissioner in terms of rule 73 (*b*), (*c*) and (*d*) of the rules of Court which was also turned down."

Judgment in this matter was given on the 28th June, 1961 and the Notice of Appeal which is dated "February, 1962" was received by the clerk of Court on the 20th March, 1962, some 8 months out of time.

Two applications for condonation of the late noting were filed by the plaintiff (appellant) but only the second of these dated 26th May, 1962, was in proper form. It discloses no good reason for the grant of condonation and, but for the fact that the Bantu Affairs Commissioner was not justified in giving the judgment he did, would have been refused. Condonation was accordingly granted.

It is sufficient for the purposes of this judgment to deal only briefly with the merits. Plaintiff was the only person who gave evidence and in the course of it he said "I am suing Defendant *because he took my beast"* (the underlining is mine). That statement stands unrefuted by defendant who did not give or lead evidence. As the essence of plaintiff's case is that defendant was unjustly enriched at his expense the plaintiff should have proceeded much further than he did into the matter. He did not and was not entitled to a final judgment in his favour.

Defendant made no defence whatsoever although plaintiff had established a *prima facie* case.

In terms of rules 54 (*a*) and (*b*) of the regulations for Courts of Bantu Affairs Commissioner in Civil proceedings *vide* Government Notice No. 2886 of 1951 the court may as a result of the trial of an action grant judgment for the plaintiff in respect of his claim in so far as he has proved the same and for the defendant in respect of his defence in so far as he has proved the same.

Mr. Booysen, who appeared for the appellant, submitted that the judgment should have been one of absolution. There was no appearance in this Court by or for the respondent.

It appears from the Bantu Affairs Commissioner's reasons for judgment that plaintiff had "failed miserably" to prove his case and that "there is no evidence on record whatsoever to even suggest that respondent was unjustly enriched at the expense of appellant".

This court cannot subscribe to this view in view of plaintiff's unrefuted statement that defendant took his beast and the admission by defendant in regard to the ownership of the ox in question at the time of the attachment.

The appeal is allowed with costs and the judgment of the Bantu Affairs Commissioner is altered to "Absolution from the instance with costs".

Cowan, President, and Botha, Member, concurred.

For Appellant: Adv. W. H. Booysen (Trevor Rogers).

Respondent in default.

SOUTHERN BANTU APPEAL COURT.

JUBELE vs. DUMA.

N.A.C. CASE No. 36 OF 1962.

UMTATA: 23rd January, 1963. Before Balk, President, Yates and Collen, Members of the Court.

PRACTICE AND PROCEDURE.

Record of proceedings—matter omitted from record—supplementing of record by affidavit in subsequent proceedings—considerations—correct procedure in this respect to apply for amendment of record. Necessity for presiding judicial officers to record nature and outcome of applications.

JUDGMENTS.

Judgment not expressing intention of court that gave it—patent error therein. Acquiescence in judgment must be clearly proved.

Summary: Plaintiff (now respondent) sued the defendant (present appellant) for—

(i) a *gwangqa nkone* cow and its bull calf or their value, £18 and £15, respectively;

(ii) a black *nkone* ox or its value, £15;

(iii) a red cow and a *nqilo* red ox or their value, £15 each.

In his plea the defendant admitted liability for two head of the cattle claimed and stated that he had offered a red cow and its red bull calf to plaintiff in payment thereof which plaintiff had accepted but he denied liability for the *gwangqa nkone* cow and its bull calf and the black *nkone* ox.

At the trial of the action the plaintiff adduced evidence and closed his case and the trial was then, according to the record, postponed. At the resumed hearing the following judgment was entered:—

"(*a*) For plaintiff for two head of cattle being (1) a *gwangqa* cow or R36 and (2) its bull calf or R30.
(*b*) Absolution from the instance in respect of three head of cattle and costs."

The defendant subsequently applied before another judicial officer for the correction of a patent error in that judgment by altering paragraph (*a*) thereof to read—

"For plaintiff for the red cow and its red bull calf (previously tendered to plaintiff) or their value £15 each and costs."

This application was dismissed as the presiding judicial officer came to the conclusion that there was no patent error in the judgment and against this decision the defendant appealed to this Court.

Although there was no indication to that effect in the record it appeared from the defendant's affidavit in support of his application that he had applied for absolution from the instance at the close of the plaintiff's case at the trial of the action in respect of the *gwangqa nkone* cow and its bull calf and also in respect of the black *nkone* ox and the court at the resumed hearing granted that application.

The attorney for the respondent took the point in this Court that the applicant had lost his right to have the judgment in the action corrected owing to his acquiescence therein in that although the defendant and his attorney were aware of the terms of the judgment as recorded when it was given and the defendant again when execution was levied, steps were only taken almost a year later, after a fresh action had been instituted by the plaintiff against the defendant for the three head of cattle for which absolution had been decreed, to have the judgment rectified.

Held: That although there was nothing to indicate that the defendant had made the application, referred to in his affidavit, for an absolution judgment in respect of that portion of plaintiff's claim denied by him (defendant) nor that such application had been granted, this was not denied in the replying affidavit made by plaintiff's attorney and as no objection was taken to the inclusion in the supporting affidavit of the paragraph dealing with such application and its outcome, which thus served to supplement the record in this respect, this Court consequently accepted that such application had been made and granted.

Held further: That where a matter, omitted from a record by the presiding judicial officer, is relied upon in subsequent proceedings by a party, application should be made to the court concerned by such party for the necessary amendment of the record.

Held further: That presiding judicial officers must record all applications made during the course of civil proceedings and the outcome thereof.

Held further: That where a judgment as recorded does not express the intention of the court that gave it there is a patent error therein.

Held further: That as it was not clear from the replying affidavit that the oral judgment given in open court in the action was in the same terms as that recorded, and as there was nothing to indicate that the judgment as recorded was explained to the defendant by the Messenger of the Court when he made the attachment and the defendant may have been under the impression that the attachment was made in pursuance of a judgment in respect of the two head of cattle in respect of which he had admitted liability, these factors were insufficient to establish that the defendant had acquiesced in the judgment as, in the case of waiver, acquiescence must be clearly proved.

Cases referred to:

Herbstein and Van Winsen's Civil Practice of Superior Courts at page 528.
Hlatshiwayo versus Mare and Deas, 1912, A.D. 242, at page 259.
Ellis and Others versus Laubscher, 1956 (4) S.A. 692 (A.D.) at page 702.
Ex parte Barclays Bank, 1936, A.D. 481, at page 485.

Appeal from judgment of Bantu Affairs Commissioner's Court, Elliotdale.

Balk (President):

This is an appeal from the dismissal, with costs, by a Bantu Affairs Commissioner's Court of an application made in terms of Rule 73 (*c*) of the Rules for those Courts for the correction of an alleged patent error in its judgment in a certain action.

In that action the plaintiff (respondent in the application and appeal) sued the defendant (applicant and appellant) for—

(1) a *gwangqa nkone* cow and its bull calf or their value, £18 and £15, respectively, which he averred were in the defendant's possession and were his (plaintiff's) property, being increase of a beast *nqomaed* by him with other cattle to the defendant's late father (hereinafter referred to as " the deceased ") whose heir the defendant is; and

(2) three unspecified cattle or their value, £15 each, to replace—

(*a*) a black *nkone* ox belonging to the plaintiff which was used by the deceased at a marriage ceremony; and

(*b*) a red cow and an *nqilo* red ox owned by the plaintiff and used by the defendant for *thombisa* ceremonies, all three of which the deceased had undertaken to refund to the plaintiff.

In his plea the defendant denied that the *gwangqa nkone* cow and its bull calf belonged to the plaintiff and alleged that this cow had been allotted by the plaintiff as a permanent *ubulungu* beast to one Nojikile whilst it was still a heifer. The defendant also denied in his plea that the deceased had used the black *nkone* ox belonging to the plaintiff but admitted liability for the remaining two head of cattle claimed and stated that he had offered a red cow and its red bull calf to the plaintiff in payment thereof which plaintiff had accepted but refused to take delivery of and which he again tendered.

At the trial of the action the plaintiff adduced evidence and closed his case and the trial was then, according to the record, postponed. At the resumed hearing the following judgment was entered:—

" (*a*) For plaintiff for two head of cattle being (1) a *gwangqa* cow or R36 and (2) its bull calf or R30.

(*b*) Absolution from the instance in respect of three head of cattle and costs."

The defendant applied for the correction of a patent error in that judgment by altering paragraph (*a*) thereof to read—

"For plaintiff for the red cow and its red bull calf or their value, £15 each and costs.";

on the grounds that—

"(*a*) The defendant having consented to judgment in respect of claim 5 (*b*)—the 2 "*tombisa*" cattle, the Court could not have given an absolution judgment in respect thereof, and

(*b*) as the Court gave an absolution judgment at the close of plaintiff's case, it could not grant judgment for plaintiff in respect of claim 3 (*a*) which was disputed by defendant and in respect of which defendant had not had an opportunity of leading rebutting evidence."

"Claim 5 (*b*)" refers to the paragraph of the particulars of claim in the summons so numbered which contains the averment that the red cow and the *nqilo* red ox were used by the deceased for *thombisa* ceremonies under promise of refund; and "claim 3 (*a*)" refers to paragraph 3 of those particulars in which the basis of claim to the *gwangqa nkone* cow and its bull calf is set out.

The defendant did not consent to judgment for the two head of cattle to replace the two head used by the deceased for *thombisa* ceremonies but again tendered the red cow and its red bull calf as indicated above.

The Bantu Affairs Commissioner dismissed the application for the correction of the judgment as he came to the conclusion that there was no patent error therein.

The appeal against the dismissal of that application is brought on the following grounds:—

"1. That the judgment is against the weight of evidence, the facts proved and the probabilities of the case.

2. That the judgment was bad in law in that there was a patent error, the Judicial Officer having recorded a judgment in conflict with the record."

According to the affidavit by the defendant's attorney filed in support of the application (hereinafter referred to as "the supporting affidavit"), he applied for absolution from the instance at the close of the plaintiff's case at the trial of the action in respect of the *gwangqa nkone* cow and its bull calf which constituted claim (*a*) of the prayer in the summons and also in respect of the replacement claimed for the black *nkone* ox in claim (*b*) of that prayer and the Court at the resumed hearing granted that application.

There is nothing in the record indicating that such application was made or granted but as this is not denied in the replying affidavit made by the plaintiff's attorney (hereinafter referred to as "the replying affidavit") and as no objection was taken to the inclusion in the supporting affidavit of the paragraph dealing with that application for absolution from the instance and its outcome which thus served to supplement the record in this respect, it seems to me that this Court should accept that such application was made and granted even though application was not made by the applicant's attorney to have the record amended accordingly, as should have been done in terms of sub-rule 55 (7) read with sub-rule 84 (5) of the rules for Bantu Affairs Commissioner's Courts, see *Herbstein and Van Winsen's Civil Practice of Superior Courts* at page 528 and the authorities there cited. Here it must be impressed on the Assistant Bantu Affairs Commissioner who presided at the trial of the action that all applications made in the course of civil proceedings and the outcome thereof must be recorded. The necessity therefor has been stressed in reported judgments of this Court so that there appears to be little excuse for the Commissioner's omission.

As the evidence of the defendant's attorney in the supporting affidavit that the Assistant Bantu Affairs Commissioner granted his application for absolution from the instance in the action was not called into question in the replying affidavit and thus remained uncontroverted, it is manifest, as submitted by Mr. Airey in his argument on behalf of the appellant and as was properly conceded by Mr. Muggleston who appeared in this Court for respondent, that the judgment in the action as recorded does not express the intention of the Court which gave it, for the defendant's attorney applied for absolution from the instance in respect of the two head of cattle for which judgment was entered for the plaintiff, viz., a *gwangqa nkone* cow and its bull calf. It follows that there is a patent error in that judgment, see *Ex Parte Barclays Bank*, 1936 A.D. 481, at page 485.

Mr. Muggleston contended that the applicant had lost his right to have the judgment in the action corrected owing to his acquiescence therein as it was apparent from the replying affidavit that the defendant and his attorney became aware of the terms of the judgment as recorded in the action when it was given on the 12th June, 1961, and the defendant again when execution was levied and the two head of cattle awarded to the plaintiff in the recorded judgment, viz., the *gwangqa nkone* cow and its bull calf, were attached by the Messenger of the Court in terms of the relative writ and handed over to the plaintiff in October, 1961, without the defendant taking any steps to have the judgment rectified until almost a year later, i.e. on the 7th September, 1962, when he made the instant application.

To my mind, it is by no means clear from the replying affidavit that the oral judgment given in open court in the action was in the same terms as that recorded as paragraph 4 of that affidavit in which it is averred the defendant and his attorney were present in Court when the judgment was given does not indicate the terms in which it was then given. That this is the position was submitted by Mr. Airey and finally conceded by Mr. Muggleston. Morever, it appears from the supporting affidavit that the defendant's attorney only discovered the error in the judgment after a fresh action had been instituted by the plaintiff against the defendant for the three head of cattle in respect of which absolution from the instance had been decreed in the initial action and the defendant's attorney had in the further action pleaded *res judicata* in respect of two of them, i.e. the two in respect of which liability had been admitted by the defendant.

Admittedly, there is no explanation why the defendant took no steps to have the judgment in the initial action rectified when the two head of cattle specified therein, i,e, the *gwangqa nkone* cow and its red bull calf, were attached in execution and handed to the plaintiff. In my view, however, the fact that the defendant failed to take such steps is not in itself sufficient to establish that he had acquiesced in the judgment as there is nothing in the papers to show that the judgment as recorded was explained to the defendant by the Messenger of the Court when he made the attachment and the defendant may have been under the impression that the attachment was made in pursuance of a judgment for the two head of cattle in respect of which he had admitted liability; and, as in the case of waiver, acquiesence must be clearly proved, see *Hlatshiwayo versus Mare and Deas*, 1912, A.D. 242, at page 259, and *Ellis and Others versus Laubscher*, 1956 (4), S.A. 692 (A.D.), at page 702.

In the result the appeal should be allowed, with costs, and the judgment of the Bantu Affairs Commissioner's Court on the application to correct the judgment in the initial action (Bantu Affairs Commissioner's Court Case No. 105/60) should be altered to read as follows:—

"The application is allowed, with costs, and the following sub-paragraph (*a*) is substituted for sub-paragraph (*a*) of the judgment in the initial action (Bantu Affairs Commissioner's Court Case No. 105/60):—

'(*a*) For plaintiff for two head of cattle or their value, R30 each, being the two of the three cattle claimed in paragraph (*b*) of the prayer in the summons to replace the two referred to in sub-paragraph 5 (*b*) of the particulars of claim in the summons, and costs.'"

It should be added that this rectification does not follow the wording suggested in the application, i.e. "For plaintiff for the red cow and its red bull calf or their value, £15 each and costs", as the plaintiff claimed two unspecified cattle or their value, R30 each, and it was not established that the plaintiff accepted the red cow and its red bull calf which were tendered by the defendant. On the contrary as the defendant in the suggested wording included the award of costs to the plaintiff, it must be assumed that he placed no reliance on the tender and both Mr. Airey and Mr. Muggleston intimated that in the event of this Court allowing the appeal and altering the judgment of the Bantu Affairs Commissioner's Court to one granting the application for the correction of the alleged patent error they agreed that paragraph (*a*) of the judgment as corrected should be in the terms set out above.

Yates and Collen, Members, concurred.

For appellant: Mr. F. G. Airey of Umtata.

For Respondent: Mr. K. Muggleston of Umtata.

NORTH-EASTERN BANTU APPEAL COURT.

NKOSI vs. NSELE.

B.A.C. CASE No. 45 OF 1962.

ESHOWE: 29th November, 1962. Before Craig, Acting President; Parsons and Colenbrander, Members of the Court.

PRACTICE AND PROCEDURE.

Interpleader proceedings—when competent—Rules 65 (4) *and* (5) *and* 70 *of Bantu Affairs Commissioner's Court.*

Summary: Cattle were legally seized by virtue of a valid warrant of execution and handed over by the Messenger of Court to the execution creditor. Thereafter a third party instituted interpleader proceedings.

Held: That in the circumstances interpleader proceedings were not available to the claimant but that he could have recourse to an ordinary vindicatory action.

Cases referred to:

Jiyane versus Mthembu, 1952, N.A.C. 200.
Zulu versus Ndwandwe and *Zulu versus Kumalo,* 1957, N.A.C. 154.

Statutory references:

Bantu Affairs Commissioner's Court rules 65 (4) and (5), 70. Appeal from Court of Bantu Affairs Commissioner at Nongoma.

Craig (Acting President):

This purports to be an interpleader action in terms of rule 70 of the Bantu Appeal Court's rules and in respect of which form 39 was issued.

Mr. White, who appeared for the appellant, asked for the admission of a further ground of appeal to the effect that interpleader proceedings were not competent in this case but as the requirements of rule 14 of the rules of this Court had not been complied with he was unable to pursue his application.

Be that as it may the court *mero motu* raises the point of the competency of such proceedings.

It is clear from the return of service of the Messenger of Court that he completed the execution in terms of the warrant issued and handed the cattle attached to the execution creditor.

There is nothing on record to indicate that any of the parties concerned complied with the requirements of Bantu Affairs Commissioner's Court rules 65 (4) and (5).

In these circumstances interpleader proceedings were not competent in terms of rule 70 as it seems clear that the Messenger of Court was not the "applicant" in this case. The attention of the Bantu Affairs Commissioner is drawn to the cases of *Jiyane versus Mthembu,* 1952, N.A.C. 200 and *Zulu versus Mdwandwe* and *Zulu versus Kumalo,* 1957, N.A.C. 154, at page 155, where it is laid down in what circumstances interpleader proceedings are available.

In the circumstances the Commissioner should have dismissed the application by Nkwateni Nsele who was, presumably, the applicant.

The appeal will be allowed with no order as to costs and the Commissioner's judgment altered to "Application dismissed, with costs".

This judgment will not act as a bar to any action which claimant may wish to bring to vindicate the stock which he alleges to be his.

Parsons and Colenbrander, Members, concur.

For Appellant: Mr. F. P. Behrmann (Davidson & Schreiber).

Respondent in default.

NORTH-EASTERN BANTU APPEAL COURT.

MAJOZI vs. MAJOZI.

R.A.C. CASE No. 31 OF 1962.

PIETERMARITZBURG: 23rd November, 1962. Before Cowan, President; Craig and Botha, Members of the Court.

NATIVE LAW.

Allotment of girl as source for lobolo *for a younger son—whether her illegitimate daughter replaces her as* lobola *source in event of her death before marriage.*

Summary: A girl was allotted to a younger son by a kraalhead as the source from which he was to obtain cattle to *lobolo* a wife for himself. The girl allotted gave birth to an illegitimate daughter and thereafter died before marriage. In due course *lobolo* was given for the illegitimate daughter and this was appropriated by the younger son who claimed he was entitled to it in place of the *lobolo* which would have been paid for her mother had she not died. The kraal heir sued the younger son for delivery to him of the *lobolo* and the Bantu Affairs Commissioner gave judgment in favour of the latter.

Held: That the decision in the case of *Ntyingile versus Ntshingile,* 1913, N.H.C. 140, was no authority for the Bantu Affairs Commissioner's judgment.

Held further: That the *lobolo* of the illegitimate daughter accrued to the heir of her house and not to the junior son to whom her deceased mother had been allotted.

Cases referred to:

Naphtali Ntyingile versus Zebulon Ntshingile, 1913, N.H.C. 140.
Madhlala versus Madhlala, 1945 (*N. and T.*), 40.

Works referred to: Stafford & Franklin "The Principles of Native Law and the Natal Code" at page 89.

Appeal from judgment of the Bantu Affairs Commissioner at Greytown.

Cowan, President:

The accepted evidence in this case was as follows: The late Mtubelezi had five children by his wife, Mazwane. The eldest son was Ntshusho and the second son Elphas. Mtubelezi allotted a girl to Ntshusho and Esta, the youngest daughter of that house, to Elphas. After the allocation had been made Esta gave birth to an illegitimate daughter, Elda, and subsequently died while she was still single and before any *lobolo* had been paid for her. Elda got married after the death of both Mtubelezi and Ntshusho and the *lobolo* paid for her was appropriated by Elphas who claimed that he was entitled to receive it in the place of the *lobolo* which would have been paid for Esta had she not died.

The son and heir of the late Ntshusho subsequently brought an action in the court of a Bantu Affairs Commissioner against Elphas for the recovery of Elda's *lobolo* and the Commissioner, who based his finding on the decision in the case of *Nahphthali Ntyingile versus Zebulon Ntshingile,* 1913 N.H.C. 140, entered judgment for the defendant (Elphas) with costs. This judgment has been brought before this court on appeal on the following grounds:—

1. That having properly found that the late Esta Majozi had been "allocated" to Defendant by the late Mtubelezi Majozi, as being the source from which he was to obtain his *lobolo,* the Native Commissioner erred in deciding that defendant was automatically entitled to the *lobolo* of Elda Majozi, the illegitimate daughter of Esta Majozi born after her mother's "Allocation", because of Esta Majozi's death prior to her marriage.
2. Alternatively, if the Native Commissioner was correct in deciding that Elda's substitution for Esta flowed automatically because of the latter's death before having married, he should have given judgment in favour of plaintiff for one (1) head because defendant admitted that he had received one (1) head as an *Mvimba* (i.e. damages) beast for the seduction of Esta and ten (10) *lobolo* cattle for Elda making a total of eleven (11) head.

3. That in any event plaintiff is not bound by an "allocation", made prior to his birth, where such allocation was not completed by delivery of the *lobolo* cattle prior to plaintiff becoming entitled to them by virtue of his being the general heir of his late father who in turn was the general heir of the late Mtubelezi Majozi.

Doubt was cast on the correctness of the decision in Ntyingile's case by the learned authors of "The Principles of Native Law and the Natal Code" at page 89 and it would seem from the judgment of the learned President of this court in the case of *Madhlala versus Madhlala*, 1945 (N. & T.) 40 that this court was also of the opinion that that judgment went too far. In the view which I take of the matter Ntyingile's case is in fact no authority for the proposition that if a girl has an illegitimate daughter at the time of her allocation it follows automatically in Native law that her illegitimate daughter is allocated with her. It must be borne in mind that the allocation of a girl is a formal matter and one would ordinarily suppose that in making such an allocation her father or guardian would specifically indicate that he was allotting the illegitimate child as well as the girl if this was indeed his intention. Any case of this nature would therefore have to be dealt with on its individual merits regard being had to what was said by the girl's father or guardian at the time that the allocation was made and the circumstances attending such an allocation. As I read the report of Ntyingile's case, there is nothing which would indicate that the Court arrived at its judgment by applying Native law and the wording of the judgments points rather to the conclusion having been arrived at on the facts themselves.

For these reasons I am unable to agree with the submission of Mr. van Heerden, who appeared for the respondent, that the Commissioner correctly relied on the judgment in Ntyingile's case in deciding the instant one and that this court, following the *stare decisis* rule, should confirm his judgment. The cases are in any event distinguishable as in Ntyingile's case the girl had given birth to an illegitimate daughter before her allocation and in the case before us she bore the child after she had been allocated.

No cases having a direct bearing on the question which has been posed were cited by counsel nor has this court been able to find any and the point was referred to the Bantu assessors whose replies form an addendum to this judgment. The assessors were divided in their opinions, the majority holding the view that the *lobolo* of the illegitimate daughter of the girl who had been allotted accrues to the heir of the house and not to the junior son to whom the girl herself was allotted. This Court agrees with the correctness of this opinion as it accords with the accepted principle of Bantu law and custom that the allocation of a girl is merely for the purpose of assisting a son to *lobolo* his wife.

The appeal is accordingly allowed with costs and the judgment of the Bantu Affairs Commissioner is altered to one of. "For plaintiff as prayed with costs."

ADDENDUM.

OPINION OF ASSESSORS.

Names of Assessors:

1. Ernest Zulu (Nongoma).
2. Makhukhuza Zulu (Melmoth).
3. Gilbert G. Mkize (Nongoma).

Question: A kraalhead allocates a daughter to his unmarried son of the same house. Should the girl get married and the *lobolo* for her be paid only after the father's death in whom would the ownership of the cattle vest? In the heir of the late kraalhead or in the younger son to whom she had been allotted?

Replies:

Ernest Zulu: The ownership vests in the son to whom the girl was allocated. The cattle are received and accepted by the heir of the house but on behalf of the man to whom the girl had been allocated because the allocation means the gift of the *lobolo* cattle to the younger son.

Makhukhuza Zulu: If the father gives a girl to his son, when the girl marries then her *lobolo* cattle go to the son to whom the girl had been allocated. Ownership of such cattle cannot accrue to anyone else. If the father is still alive when the girl marries and the *lobolo* is paid he accepts the cattle. So the father takes one beast as compensation for his buttocks. The younger son would not be deprived of the cattle because they were given to him by his father.

Gilbert G. Mkize: I say the house of the younger son gets the *lobolo* cattle.

Question: Should the girl who has been allotted be seduced and rendered pregnant after the death of the kraalhead, to whom would the *mvimba* beast in respect of her pregnancy be payable? The heir or the younger son to whom she had been allotted?

Replies:

Ernest Zulu: The *mvimba* beast in such case goes to the heir. The father's heir.

Makhukhuza Zulu: I say if there are 2 sons living at the same kraal it would be alright if the *mvimba* beast goes to the heir but if the younger son has his own separate kraal then the *mvimba* beast should be delivered to him. I say this because after the seduction of the girl this son will not get full number of cattle if she had not been seduced. He expects to get the full number which includes the *mvimba* beast. If my father gives me a cow and the cow breeds the breeding belongs to me, not to anyone else.

Gilbert Mkize: The *mvimba* beast must go to the heir of the house.

Question: Supposing that the allotted girl had given birth to an illegitimate daughter after the allocation but before her marriage, to whom would the *lobolo* of the illegitimate daughter be payable? To the heir or to the younger son to whom the mother of the child had been allotted?

Replies:

Ernest Zulu: It would go to the heir of the house. The *lobolo* of the illegitimate girl.

Makhukhuza Zulu: It seems to me it would not be right if the *lobolo* of the illegitimate daughter is taken by the heir of the house because the girl was allocated to the younger son before she bore this illegitimate child and now that she has delivered this illegitimate child I do not see why the rights of the illegitimate child should go to the heir of the house instead of to the man to whom the mother was allocated.

Gilbert Mkize: The *lobolo* of the illegitimate child goes to the heir of the house.

Question: Will it make any difference if she dies after giving birth to the illegitimate daughter but before she gets married and *lobolo* was paid for her?

Replies:

Ernest Zulu: The *lobolo* of the illegitimate child goes to the heir of the house and not to the man to whom the deceased girl was allocated. The allocation of a girl to a son does not make any difference as far as the rights of the house are concerned. The position would be different if the father made a statement to his son to the effect that this illegitimate child would be given to the son.

Makhukhuza Zulu: My answer is still: If the father after allocating this girl to a young son dies I do not see why the young son should be deprived of the rights in regard to the *lobolo*. Because this illegitimate child is the bowels of the girl who died. The girl had been allocated to him.

Gilbert Mkize: I say the *lobolo* received for the illegitimate child goes to the heir of the house.

Question: Supposing the girl had an illegitimate daughter at the time she was allotted to the younger son, who would be entitled to the *lobolo* of the illegitimate child?

Replies:

Ernest Zulu: The *lobolo* accrues to the house. The *lobolo* of the first illegitimate daughter accrues to the house, to the father or the heir.

Makhukhuza Zulu: I say if the father allocates the girl who has already had an illegitimate child, that child is regarded as a debt of the house. It goes to the heir.

Gilbert Mkize: The child is re-allocated by the father of the house or by the heir of the house.

Question: What would be the position if the younger son married before *lobolo* had been paid for the girl who had been allotted to him and had provided his own *lobolo* out of his own earnings? To whom would the lobolo of the allocated girl go then?

Replies:

Ernest Zulu: The *lobolo* of that girl that was allocated to him would go to the younger son.

Makhukhuza Zulu: The *lobolo* of the girl will go to the man to whom she had been allocated. That is, of course, if the evidence is that the father did allocate this girl to the man.

Gilbert Mkize: The *lobolo* paid for the girl who was allotted to the younger son would go to the younger son. I think that arrangements should be made by the heir of the house if he is alive and then passes the cattle on to his younger brother.

Mr. Niehaus: Is it then clear Native custom and also law that all that is given on allocation is the cattle that are given in respect of that girl?

Replies:

Ernest Zulu: Yes.

Makhukhuza Zulu: Yes.

Gilbert Mkize: The allocation simply means a gift of the cattle.

Mr. Niehaus: Should the girl die before *lobolo* is paid there is no debt created in favour of the younger son?

Replies:

Ernest Zulu: Definitely not.

Makhukhuza Zulu: No debt.

Gilbert Mkize: No debt.

Mr. van Heerden: Can you remember an instance where a girl was allocated to the younger son where she had an illegitimate child and she died before *lobolo* was indicated?

Replies:

Ernest Zulu: It is common occurrence but I cannot point out any particular case.

Makhukhuza Zulu: No, I cannot indicate such a case.

Gilbert Mkize: I can not remember one particular case. It is common amongst the people.

Craig and Botha, Members concurred.

For Appellant: Adv. W. O. H. Menge (Hellett & De Waal).

For Respondent: Mr. J. B. Tod (J. B. Tod & Co.).

CENTRAL BANTU APPEAL COURT.

KAPATHENG JOSEPH MOGAPI vs. ALFRED GOPANE.

CASE No. 11 OF 1962.

JOHANNESBURG: 5th September, 1962, and 22nd October, 1962. Before O'Connell, President, Gold and Van Schalkwyk, Members of the Court.

BANTU LAW AND CUSTOM.

Tswana Law—liability of Kraalhead for payment of fines imposed on inmates of his kraal—audi alteram partem.

Summary: Two inmates of a kraal were lawfully convicted and fined one beast each by the tribal *lekgotla.* Execution was levied against the kraalhead's stock. The trial and execution took place during the kraalhead's absence from the area. On his return, the kraalhead sued the chief for the return of the two head of cattle or their value. The Court *a quo* found for the defendant and appeal was noted on the grounds (*a*) that according to Bantu Law and Customs a kraalhead is not liable for fines imposed on inmates of his kraal; alternatively (*b*) if he is so liable, proceedings cannot be instituted in his or his representative's absence and (*c*) execution cannot be levied against his property unless he is joined as a party.

Held: That under Tswana Law and Custom a kraalhead is liable for the payment of fines imposed by the *lekgotla* on inmates of his kraal, but *held* further (by a majority, Van Schalkwyk dissenting) that he is not so liable unless he or his representative is present at the trial, is informed of the charge against the inmate and is afforded an opporunity of placing any defence he might have before the *lekgotla.*

Held further: In this respect Tswana Law and Custom is not opposed to the principles of natural justice.

Held further: Relatives who attend a trial merely as spectators do not properly represent an absent kraalhead.

Statutes referred to:

Sections *eleven* (1), *twenty* (5) (*a*) of Act No. 38 of 1927, as amended.

Cases and authorities referred to:

Rabulana versus Tungana, 1, N.A.C. 90 (1905).
R. versus Jokwane, 1947 (2), S.A. 1026.
Handbook of Tswana Law and Custom by Schapera (Second Edition), p.p. 50 and 177.

Appeal from the Court of Bantu Affairs Commissioner at Zeerust.

Cur. adv. vult.

POSTEA (JOHANNESBURG), 22ND OCTOBER, 1962.

O'Connell, President (with whom Gold, Permanent Member, concurs):

Just cause having been shown, the late noting of appeal was condoned by this Court.

For convenience, the parties will throughout this judgment be referred to as the plaintiff and the defendant, respectively.

The defendant is the Chief of the Bahurutsi tribe of Natives (a portion of the Tswana Tribe) of Zeerust. He is authorised in terms of section *twenty* of Act No. 38 of 1927, as amended, to try and punish any native who has committed in the area under his control any of the offences referred to in sub-paragraphs (*a*) (i) and (ii) of paragraph (1) of that section.

The plaintiff is an adult male member of the Bahurutsi tribe and a subject of the defendant. His kraal is situate at Gopanestad in the district of Zeerust. Inmates of his kraal are his wife, Tebego, and his unmarried son Jacob. On the 26th January, 1958, the Plaintiff fled to Bechuanaland to avoid certain disturbances then prevalent in the district. He did not return to the district or to his kraal until 27th December, 1960. During his absence, Tebego and Jacob were, on the 22nd February, 1958, and the 18th January, 1960, respectively, charged in the defendant's Court with having committed certain offences and were found guilty. Tebego was sentenced to pay a fine of £5 or one beast and Jacob to a fine of £15 or one ox. The fines were not paid and during the first half of 1959 the defendant's tribal messengers repaired to the grazing grounds and there attached a beast, the property of the plaintiff, in execution of the judgment in Tebego's case. Again, when the plaintiff's cattle were produced for inspection in March, 1960, the tribal messengers attached an ox, the property of the plaintiff, in execution of the judgment in Jacob's case. This ox was eventually sold for £24 which was paid into the tribal fund. The beast attached in 1959 is still in the tribal camp and may be redeemed upon payment of the £5 fine plus any additional charge the *lekgotla* might fix for grazing and herding.

Tebego and Jacob have not appealed against their convictions and sentences.

On the 7th November, 1961, the plaintiff sued out a summons in the Bantu Affairs Commissioner's Court claiming from the defendant the return of the two cattle or their value, £150. Paragraph 4 of the particulars of the claim reads:—

> "4. During or about May, 1960, defendant wrongfully, unlawfully and maliciously seized or caused to be seized certain two head of cattle, the property of the plaintiff and has not returned them since. The value of the said two head of cattle is the sum of £150."

The defendant's plea is a denial of each and every allegation contained in paragraph 4 of the summons and, alternatively, that Jacob and Tebego, unemancipated inmates of the plaintiff's kraal, were properly arraigned, convicted and sentenced, did not appeal against their convictions and/or sentences and did not pay the fines or any portion of them; that the plaintiff as their kraalhead was liable under Native Law and custom for the payment of the fines and upon his failure to pay the said fines the defendant became entitled to execute the sentences according to Native Law and custom against the plaintiff as kraalhead and, as he was entitled to do, the defendant, in the early half of 1959 and during or about March, 1960, executed the said sentences properly and attached on each occasion, through his Messengers, one head of cattle from plaintiff's kraal " all in accordance with and in terms of section *twenty* of Act No. 38 of 1927 ".

After hearing the evidence adduced by the parties, the Bantu Affairs Commissioner entered judgment for the defendant with costs. Against this judgment the plaintiff appeals on the following grounds: —

" 1. The Commissioner erred in law in holding that according to Native Law and custom a kraalhead is liable to pay the fines imposed upon members of the kraal;

2. *Alternatively*, in the event of the kraalhead being liable to pay the fines of members of his kraal, the Court erred in finding that—

(*a*) such proceedings could be instituted in the absence of the kraalhead or his duly and properly appointed deputy;

(*b*) execution could be levied against the assets of the kraalhead without his being joined as a party thereto;

3. The Court erred in granting judgment for the Defendant with costs."

Because Tswana Native Law is involved in this case, Tswana assessors were called and questioned by this Court. The questions put to them and their replies thereto appear at the end of this judgment. For convenience, their replies are here summarised: —

(*a*) The earnings of an unmarried inmate of a kraal and any stock purchased therewith, become the property of the kraalhead;

(*b*) The kraalhead is responsible for the payment of fines imposed by the *lekgotla* upon his wife and/or the unmarried inmates of his kraal in respect of offences of which they are convicted;

(*c*) The kraalhead, or if he is absent, his representative must be informed of the date of the trial and, when he appears at the *lekgotla,* of the charge against the accused;

(*d*) Should an accused appear alone, the *lekgotla* will instruct him to fetch the kraalhead or, if he be absent, his representative, and will postpone the trial until the latter appears. This is so even if the accused admits the charge (The one assessor says that if the accused admits the charge, the case may proceed in the absence of the kraalhead but the others do not agree with him and his own earlier statement on this point is to the contrary.)

(*e*) During the absence of the kraalhead his representative is his brother, i.e. the paternal uncle of the accused. He requires no formal appointment but appears at the *lekgotla* and informs the Court that he does so for and on behalf of the absent kraalhead. Should the paternal uncle be absent, the accused's maternal uncle may act in his stead.

(*f*) The fine should be brought to the *lekgotla* by the person responsible for its payment. It is only when he delays in so doing that the tribal messengers are sent to collect the fine. They proceed to the cattle posts and there they attach one beast in respect of the fine plus an additional beast as a punishment for the delay. The attached cattle are driven to the lekgotla and the kraal head or, in his absence, his representative is then called and the cattle are pointed out to him.

Mr. Schwartzman, counsel for the plaintiff, submitted before us that the defendant had failed to establish that the kraalhead was responsible for the payment of fines imposed upon the inmates of the kraal and that if Tswana custom did hold the kraalhead so responsible, such custom was contrary to public policy in that it offended against the *audi alteram partem* rule. Alternatively, he argued that the kraalhead could only be held responsible if certain prerequisites were present, viz., that the kraalhead be advised of the charge and that he be present or be represented at the trial. If, he said, the inmates who had been convicted could not pay the fines, the Chief should not have executed against the property of the absent kraalhead but have taken them before the Bantu Affairs Commissioner to be dealt with in terms of section *twenty* (5) (*a*) of Act No. 38 of 1927.

Mr. Myburgh, counsel for the defendant, contended that the kraalhead was in law responsible for payment of the fines; that a kraal was never *in vacuo* because there was always somebody responsible for its management; there were no irregularities in the proceedings before the Chief and that the convictions and sentences were, therefore, in order; that the Chief could not act in terms of section *twenty* (5) (*a*) of the Act until he had exhausted all the remedies open to him, i.e. until he had attempted to recover from the kraalhead; and that the plaintiff had not proved the value of the cattle he sought to recover.

From the Assessors' replies and the statement on this point at page 50 of *Schapera's* "Handbook of Tswana Law and Custom", it is clear that in Tswana law the kraalhead is responsible for the payment of any fines imposed upon the members of the kraal.

The first ground of appeal must, therefore, be rejected. The assessors stress throughout the necessity for advising the kraalhead of the charge and of affording him an opportunity to be heard. There is, therefore, no substance in the submission that the custom is contrary to public policy.

The Bantu Affairs Commissioner held that the defendant had established his alternative plea. He arrived at this conclusion because, so he says in his reasons for judgment, the convictions and sentences of Tebego and Jacob were lawful notwithstanding the fact that the plaintiff was not present at or represented at their trials and, in view of the fact that the Plainiff was in Tswana law responsible for the payment of the fines imposed, the subsequent execution of the sentences was in accordance with Native law and custom. In effect, his finding is that all that is necessary to saddle a kraalhead with the responsibility for the payment of a fine imposed upon an inmate of his kraal is that the conviction be a lawful one and that the kraalhead's having knowledge of the charge and his presence or representation at the trial are not conditions precedent to his being held liable.

This finding conflicts with the opinions of the assessors from whose statement of the law only one inference can be drawn, namely, that the kraalhead cannot be held liable for a fine imposed upon an inmate of his kraal unless he or his representative be present at the trial and be informed of the charge against the inmate.

The reason for holding the kraalhead responsible for the misdeeds of the inmates of his kraal is exactly the same in the case of crimes as it is in the case of delicts. It is because he is "a surety for the good behaviour of members of his kraal" (see *Rabulana versus Tungana*, 1, N A C 90 (1905) and *Schapera* "Handbook of Tswana Law and Custom", at page 177) and also because he, as the sole *de jure* owner of the kraal property, is the person who would have to pay any damages awarded or fine imposed in a proper case. It follows, therefore, that the same principles must be followed in determining whether or not a kraalhead is responsible for the payment of a fine as are followed in determining whether or not he is liable for the payment of damages. While it is true, as the Bantu Affairs Commissioner points out, that there has been no judicial pronouncement on the question of the liability of a kraalhead in Tswana law for fines imposed upon the inmates of his kraal, there is an abundance of authority dealing with the question of kraalhead responsibility for delicts committed by the inmates of his kraal which serves as a guide as to the principles to be followed in determining the question of liability for fines. All these authorities lay down in no uncertain terms that the kraalhead cannot be held responsible for the delicts of the inmates of his kraal unless he be joined as a co-defendant in the action—see *Rabulana's* case, *supra*. That being so, and having regard to the opinion of the assessors, we hold that a kraalhead cannot in Tswana law be held liable for the payment of a fine imposed upon an inmate of his kraal unless he or his representative is present at the trial, is informed of the charge against the inmate and is afforded an opportunity of placing any defence he might have before the lekgotla.

An absent kraalhead is not properly represented where one or more of his relatives, who have neither been informed of the charge nor called upon to appear for and on his behalf, attend the trial merely as spectators and take no part whatsoever in the proceedings. The Bantu Affairs Commissioner is, therefore correct in holding, as he does, that the plaintiff was not properly represented at the trials of Tebego and Jacob and that the plaintiff's relatives who attended the trials did so merely as spectators; he, however, fell into error when, notwithstanding this finding, he held that the plaintiff was liable for the fines imposed upon his wife and son.

Even if we be wrong in this and it is indeed Tswana law that all that is necessary to saddle a kraalhead with responsibility for the payment of fines is that the convictions of the kraal inmates be lawful and that there is no need to advise him of the charges or afford him an opportunity to be heard, the defendant is in no better case for such a law would clearly be opposed to the principles of natural justice and the court would, in terms of the first proviso to sub-section (1) of section *eleven* of the Native Administration Act (Act No. 38 of 1927), as amended, be precluded from applying that law.

The appeal is upheld, with costs, and the judgment of the court *a quo* is altered to one for the plaintiff. Though the evidence of the plaintiff as to the value of the cattle is not very satisfactory, there is the fact that the one beast realised the sum of £24 (R48) when sold and this figure may be taken as a safe guide as to the value of the animals.

The judgment of the court *a quo* is therefore altered to read "For plaintiff for the return of 2 head of cattle or their value, R48 each, and costs".

Van Schalkwyk, lid (*dissentiente*).

Dit spyt my dat ek nie met al die beredenerings en uiteindelike bevinding van my mede-lede van die Hof kan saamstem nie.

Die feite is volledig uiteengesit deur die Voorsitter en hoef dus nie herhaal te word nie.

Ek stem saam dat dit Tswana Wet en gewoonte is dat 'n kraalhoof verantwoordelik is vir die betaling van boetes wat lede van die inwoners van sy kraal opgelê is en dat die eerste grond van appél dus wegval.

Dit is duidelik van vrae aan en antwoorde van die Bantoe Assesore dat die kraalhoof se verantwoordelikheid nie net vloei uit die beginsel dat hy wet en orde in sy kraal moet handhaaf nie, maar grootliks op grond daarvan dat 'n minderjarige kind of sy vrou geen kraal bates kan besit nie en dat alle inkomste van ongetroude kinders aan die kraalhoof behoort en hy hom dus in die posisie van 'n " betaalmeester " bevind.

Anders as in siviele gedinge waar die vonnis direk die kraalhoof opgelê word om na te kom, word die boetes in kriminele verrigtinge op die boosdoener (beskuldigde) persoonlik opgelê. 'n Kraalhoof kan nie krimineel vervolg word vir 'n misdaad wat deur 'n inwoner van sy kraal gepleeg is nie. (Sien *Kroon teen Jokwane,* 1947 (2), S.A.L.R. 1026) maar hy is nogtans volgens Tswana gewoonte verantwoordelik vir die betaling van 'n boete wat direk die inwoner opgelê is.

Volgens die antwoord op vraag 5 aan die assesore is die kraalhoof verantwoordelik " eenvoudig omdat hy die kraalhoof is. Alles is op sy kop. Hy moet al die kraalskulde betaal. Al is die misdaad gepleeg in weerwil van sy opdragte moet hy die boete wat sy seun opgelê is, betaal." Dieselfde geld vir boetes wat die kraalhoof se vrou opgelê is.

My mede-lede bevind dat alvorens 'n kraalhoof verantwoordelik gehou kan word vir die betaling van boetes wat die inwoners van sy kraal opgelê is, hy óf 'n verteenwoordiger die kriminele verhore moes bygewoon het. Mynsinsiens is dit 'n grond vir appél teen die kriminele skuldig bevinding maar dat, tot tyd en wyl die skuldigbevindings tersyde gestel is, dit deur hierdie Hof aanvaar moet word dat daar 'n onversadigde vonnis bestaan wat voltrek moet word.

Die eiser het op 26 Januarie 1958 na Bechuanaland gevlug en eers op 27 Desember 1960 na sy kraal teruggekeer. Daar is niks in sy getuienis om aan te dui wie verantwoordelikheid moes aanvaar gedurende sy afwesigheid nie. Volgens die assessore " word 'n persoon nooit alleen gebore nie; wanneer 'n vader weg is, is daar 'n oom." Alhoewel die Bantoesakekommissaris bevind het dat eiser se vrou Tebego en sy seun Jacob nie verteenwoordig was by hulle onderskeidelike verhore nie, is daar nogtans getuienis dat 'n sekere Mogapinyane Matlhola, wie met eiser se suster getroud is en wat homself as die " oog " van die kraal beskryf, asook Jacob Mogapi, 'n oom aan vaderskant van eiser by beide verhore teenwoordig was.

Gotsang Alfred Moroena, die Stam Sekretaris, getuig ook dat " Toe Tebego en Jacob voor die *lekgotla* verskyn het, hulle gevra was of hulle mense daar is. Hulle was tevrede dat die verhoor kon aangaan." Alhoewel hierdie getuie ook sê dat die beskuldigdes nie verteenwoordig was nie, kan dit ewe maklik daarvan afgelei word dat hulle net niks te sê gehad het nie.

Beide beskuldigdes het skuldig gepleit en daar was dus geen rede vir inmenging deur lede van die familie nie, wat 'n mens stellig kan verwag het as dinge nie reg was nie.

Beide Jacob, wat 'n onderwyser is en Tebego, wat 'n aktiewe lid van die African National Congress was, kan nie as so onintelligent beskou word dat hulle nie geweet het wat hulle regte was nie.

Die houdings van die eiser, sy vrou en sy seun gee deurgaans die indruk van traak-my-nie-agtigheid en opsetlike verset teen die gesag van die *lekgotla.* Nou word 'n poging aangewend om agter tegniese onderskeidings te skuil, iets wat totaal onbekend is in Bantoe reg.

Ek kom dus tot die gevolgtrekking dat die Bantoesake-kommissaris se beslissing reg is en dat die appél van die hand gewys moet word.

For Respondent: Adv. A. P. Myburgh, *i/b* State Attorney.

For Appellant: Adv. I. W. Schwartzman, *i/b* C. M. Pitye.

ASSESSORS' OPINIONS.

1. *Question:*

Under Tswana custom if an unmarried son takes up employment and earns money and with that money purchases stock, does he retain that stock as his own property?

Answer:

Joseph Baisitse: No. According to the Tswana custom when a child is working when he is still unmarried he works for his father. His father as the kraal head owns that stock.

Jan Matolong: I agree with that.

Paul Mokgoetsi: That is our Tswana custom for an unmarried son.

2. *Question:*

If a Chief's Court imposes a fine on an inmate of a kraal may that fine be recovered by the Chief by execution against the kraalhead, that is to say, by sending his messengers to take a beast or other stock from the kraalhead?

Answer:

Paul Mokgoetsi: When my unmarried son is fined by the Chief, I have to be responsible for the fine to be paid.

Joseph Baisitse and *Jan Matolong:* We agree.

3. *Question:*

Does it make any difference if the kraalhead is absent when the son commits the offence?

Answer:

Joseph Baisitse: When the kraalhead is absent then someone else is the kraalhead at that time. The Chief has to wait for me until I return; he must then call me and tell me what my son has done. Then he calls my son and decides his case. I must be present.

Paul Mokgoetsi: I agree. The son cannot be brought to the *lekgotla* in the absence of his father. The Chief has to wait for his father.

Jan Matolong: He cannot be tried and he cannot be fined in the absence of his father.

4. *Question:*

If the kraalhead is absent from the kraal may the Chief attach his stock in respect of a fine imposed on his unmarried son during such absence?

Answer:

Jan Matlolong: He cannot do it.

Paul Mokgoetsi: According to Tswana custom the kraalhead must be present.

Joseph Baisitse: I agree, but I wish to add something. A person is never born alone so when his father is away from home his uncle is there. His uncle is just like his father—he can stand for his father. Sometimes it happens that the eldest married son staying in his own kraal may act in his father's place.

5. *Question:*

Why is the kraalhead made liable to pay the fine?

Answer:

Joseph Baisitse: Simply because he is the kraalhead. Everything is on his head. He has to pay all the kraal debts. Even if the offence is committed in defiance of his instructions, the kraalhead must pay the fine imposed on his son. He may pay the fine with any beast in the kraal but sometimes he will pay with a beast earned by the son because he wishes to bring home to the latter what he has done.

Jan Matolong: I have nothing to add.

Paul Mokgoetsi: That is correct. All the stock earned by a son belongs to his father and the son is supported by the kraal. Everything is on his father's head, whatever he does, and if a fine is imposed on him then his father has to pay.

6. *Question:*

What is the position in regard to fines imposed on the kraalhead's wife or on his unmarried daughter living in the kraal?

Answer:

Paul Mokgoetsi: In such cases, the kraalhead must also pay.

Joseph Baisitsi and Jan Matolong: We agree.

7. *Question:*

Does the *lekgotla* ascertain whether the kraalhead, or his representative, is present before trying an unmarried man charged with having committed an offence.

Answer:

Paul Mokgoetsi: Yes. The *lekgotla* men will ask him "Where is your father?" When he says "My father is not here, he is away" the case is postponed. When his father is away then it will be very difficult for the *lekgotla* to proceed. The case can be proceeded with when the father is there but there are children who do not want their father to be present at the *lekgotla.* If he admits what he has done, then the case can be proceeded with.

Joseph Baisitse: The case cannot be proceeded with when all the people are not there. When the father is there the *lekgotla* will be told he is there and he will be asked "Do you see what your son has done?" Even when the young man admits the charge and his father or his uncle are not present they wait until the father or uncle can be present.

Jan Matolong: That is correct.

8. *Question:*

When an unmarried man is called to appear before the *lekgotla* on a criminal charge must his kraalhead also be advised of the date of the trial and be informed of the charge?

Answer:

Paul Mokgoetsi: The father must be advised. He will be told of the charge at the *lekgotla.* If the boy goes to the *lekgotla* alone he will be told "Go back and call your father or if he is away, his representative". They will not proceed with the case until the father, or his representative, arrives.

Jan Matolong and Joseph Baitse: We agree.

9. *Question:*

Who appoints his father's representative?

Answer:

Paul Mokgoetsi: All the Tswana know that when his father is not there then his uncle has to stand in his stead. The son would inform the *lekgotla* that his father is away and the uncle would get up and say "I am here as the kraalhead." If the uncle refuses to stand for him, they must wait for the kraalhead to return.

Jan Matolong: That is correct.

Joseph Baisitse: That is our present custom. That does not mean only the paternal uncle but the maternal uncle as well. The maternal uncle can also appear at the *lekgotla* for his sister's child. He can act if the paternal uncle is absent.

Paul Matolong and Joseph Baisitse: We agree.

10. *Question:*

May the fine imposed on an unmarried son be recovered by execution against the property of the kraalhead when the latter is not at the kraal?

Answer:

Joseph Baisitse: No, he cannot take any beast in the absence of the kraalhead. Even if the kraalhead's representative is there the messenger cannot attach a beast.

Jan Matolong: The person who is fined must take the fine to the Chief in the presence of the lekgotla. It is only when he does not bring the fine that the Chief sends out to attach a beast. The messenger cannot take a beast in the absence of the kraalhead. He must wait until he comes home.

Paul Makgoetsi: I agree to a certain extent. If the person does not pay the fine, the Chief instructs certain men of the *lekgotla* to collect it. They do no go to the kraal but to the cattle posts where the cattle graze and there they take the beast for the fine and another beast for the Chief as a punishment for the delay in paying. They take this stock to the Chief and the father of the son is called to see the cattle there. If the kraalhead is away from home, his brother, the uncle, is there and will be called to the Chief's kraal to see the cattle. The Chief's judgment must be satisfied.

Assessors:

1. *Paul Mokgoetsi,* Headman of the Tshidi-Baralong Tribe, Mafeking.

2. *Joseph Baisitse,* Headman and Councillor of the Bapuduchwane Tribe, Taung.

3. *Jan Matolong,* Senior Councillor of the Bagamaide Tribe, Taung.

SOUTHERN BANTU APPEAL COURT.

JELA *vs.* QAMBA.

N.A.C. CASE No. 48 OF 1962.

UMTATA 22nd May, 1963. Before Yates, Acting President, Blakeway and Maytham, Members of the Court.

PONDO CUSTOM.

Dowry—Liability of father to return dowry paid for second customary union with his daughter when first customary union still in existence.

Summary: Plaintiff (present Appellant) sued Defendant (now Respondent) for the return of seven head of cattle or their value which he stated he had paid to Defendant as dowry for the latter's daughter who at the time, unbeknown to Plaintiff, was already married according to Native custom to one Mkapeni.

Defendant's daughter had subsequently been returned to Mkapeni.

At the close of Plaintiff's case Defendant applied for judgment, with costs, on the ground that in Pondo custom there is an irrebuttable presumption in such circumstances that the second "husband" was aware of the previous marriage and he was, therefore, *mala fide* and had no claim against the wife's guardian for the return of the dowry as the latter, being the possessor, was in a better position since they were equally at fault. The presiding judicial officer upheld this contention and entered judgment for Defendant, with costs.

Held: That the irrebuttable presumption in Pondo custom that the second "husband" was aware of the existing customary union operates only in cases where the first husband sues him for damages for adultery and not in a case such as the instant one where the second "husband" sues the woman's guardian for the return of dowry paid under the *bona fide* opinion, arrived at after making due enquiry, as was shown by the uncontroverted evidence of Plaintiff and his witnesses, that she was unmarried at the time he entered into the customary union with her and paid *lobola.*

Cases referred to:

Native Law in South Africa (Second Edition) by Seymour at pages 243 and 250.
Sicefe vs. Nyawozake, 5 N.A.C. 17.
Gqozi vs. Mtengwane, 1960, N.A.C. 26 at page 29.
Mgnzazwe vs. Betyeka, 1 N.A.C. 193.
Mbemodala vs. Gingci, 2 N.A.C. 2.

Yates (Acting President):

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court for Defendant (present Respondent), with costs, in an action in which the Plaintiff (present Appellant) sued Defendant for the return of seven head of cattle or their value, R210, which he stated he had paid as dowry to Defendant for the latter's daughter, Mankonxeni, with whom he had entered into a customary union and by whom he had had two children. He alleged that it was subsequently held in the Deputy Chief's Court that the woman had previously been given in marriage to a man called Mkapeni and that in consequence the Defendant, at that Court's order, had returned her and the two children born whilst she lived with him as his wife to Mkapeni.

The Defendant admitted having received the cattle but stated that they were paid to him as damages for Plaintiff's adultery with Mankonxeni.

At the close of the Plaintiff's case Defendant applied for judgment, with costs, on the ground that in Pondo custom, there is an irrebuttable presumption in such circumstances that the second "husband" was aware of the previous "marriage" and he was, therefore, *mala fide* and had no claim against the wife's guardian for the return of the dowry as the latter, being the possessor, was in a better position since they were equally at fault. The Commissioner upheld this contention and gave judgment for Defendant, with costs.

The grounds of appeal were amended with the leave of this Court in terms of Rule 16 of the Rules for Native Appeal Courts (G.N. No. 2887/51) and are as follows:—

"1. That the judgment is against the evidence, the facts found proved, the weight of evidence and the probabilities of the case.

2. That at the close of Plaintiff's case the Plaintiff had establishment a prima facie case for the relief claimed and there was evidence upon which a reasonable man might give judgment in his favour.

3. That Defendant not having closed his case it was incompetent for the Court to give a final judgment in his favour and the most that could have been given was absolution from the instance.

4. That the Court erred in considering and upholding the legal point raised by Defendant's Attorney at the close of Plaintiff's case as this defence had not been raised in the pleadings and was not in issue.

5. That the Court erred in law in holding that according to Pondo custom the Plaintiff could not recover the dowry paid by him in respect of Mankonxeni in the circumstances disclosed in the unrebutted evidence adduced by Plaintiff."

Turning first of all to the fifth ground of appeal which deals with the legal point on which the Commissioner based his judgment, it is clear, as stressed by Mr. Mugglestone, who appeared for the appellant, that the Commissioner relied on the statement contained in *Native Law in South Africa* (Second Edition) by Seymour at pages 243 and 250 and the authorities there cited to the effect that in Pondo law, there is an irrebuttable presumption in cases such as this that the second husband knew of the woman's status when he married her and that he is therefore *mala fide* and unable to recover his dowry.

In other tribes if the second "husband" was *bona fide*, that is to say, was unaware of the first union he is entitled to claim from the wife's guardian the full amount of dowry paid by him, see *Gqozi vs. Mtengwane*, 1960, N.A.C. 26 at page 29 and this accords with one's conception of public policy and natural justice.

A reference to the authorities cited by Seymour and relied upon by the Commissioner indicates that the first case on which this statement is based is that of *Mguzazwe vs. Betyeka* 1 N.A.C. 193 in which the first husband sued the second "husband" for damages for adultery and in which the assessors stated that "in a case such as this if it be clear that the first marriage actually took place the first husband has a claim for damages against the second husband . . . . The foregoing holds good even though the second husband knew nothing of the first marriage . . . ."

The second case relied on is *Mbemodala vs. Gingci* 2 N.A.C. 2 and is on all fours with the previous one and in fact is based solely on that judgment and again the first husband sued the second "husband" for damages for adultery.

Similarly in regard to the third authority relied on, viz., *Nohayi vs. Njenkeni* 4 N.A.C. 19 the claim was for damages for adultery and in this case the Native assessors confirmed that in these circumstances the second "husband" would be liable in damages as an ordinary adulterer. Nowhere have I been able to find authority for Seymour's proposition that where the second "husband" sues the *guardian* for the return of the dowry paid by him in good faith he could be met with a defence of an irrebuttable presumption against him.

On the contrary in the case of *Sicefe vs. Nyawozake,* 5 N.A.C. 17 which is a Pondo case emanating from Tabankulu the assessors stated that a man paying a second dowry can make a claim on the woman's father to be re-imbursed the cattle he had paid for her provided he was not aware of the previous marriage.

This decision is quoted with approval in the case of *Gqozi vs. Mtengwane* (*supra*) at page 29 where it was pointed out that it is no more than equitable that the father who received the second dowry for his daughter during the subsistence of her customary union and thereby connived at the resultant adultery should be compelled to refund the second dowry at the instance of the dowry-payer if the latter was unaware of the subsisting customary union.

In my view therefore the presumption referred to above operates against the second "husband" only when the first husband sues him for damages for adultery and not in a case such as the instant one where the second "husband" is sueing the girl's guardian for the return of dowry paid under the *bona fide* opinion, arrived at after making due enquiry as is shown by the uncontroverted evidence of Plaintiff and his witnesses, that she was unmarried at the time when he entered into the customary union with her and paid *lobola.*

In view of this conclusion, no purpose will be served by considering at length the other grounds of appeal but for the information of the Commissioner it should be pointed out that rule 54 (*b*) of the Rules for Native Commissioners' Courts (G.N. No. 2886/51) provides that the Court may grant judgment for Defendant in so far as he has proved his case. In the instant action Defendant had at that stage led no evidence whatsoever so that the most the Commissioner could have granted was a judgment of absolution and not a judgment for Defendant. He should also have borne in mind the test to be applied in such cases, see the cases cited in Warner's *Digest of South African Native Law,* paragraph 3394 at page 291.

The appeal, therefore, should be allowed, with costs, and the judgment of the Bantu Affairs Commissioner set aside and the case returned for hearing to a conclusion and final judgment.

Blakeway and Maytham, Members, concurred.

For Appellant: Mr. K. Muggleston of Umtata.
For Respondent: No appearance.

SOUTHERN BANTU APPEAL COURT.

NDINISA, d/a *vs.* MTUZULU.

CASE No. 9 OF 1963.

UMTATA: 16th September, 1963. Before Balk, President, Yates and Potgieter, Members of the Court.

BANTU LAW AND CUSTOM.

Widow entering into agreement in regard to cattle of minor son in absence of his guardian's consent—such agreement not binding on minor—action by minor for recovery of stock not tainted by any illegality in agreement—competent for such action to be brought by way of vindicatory proceedings where stock wrongfully disposed of.

Summary: The appeal to this Court was from the judgment of a Bantu Affairs Commissioner's Court dismissing the summons with no order as to costs at the close of Plaintiff's case, on the application of the Defendant's attorney, in an action in which the Plaintiff, a minor, duly assisted, sued the Defendant for certain five head of cattle or their value.

It emerged from the evidence that the Plaintiff inherited eight head of cattle from his late father. Plaintiff's mother, Nosoliti, subsequently placed the five remaining head of cattle with the Defendant so that the latter could move them without a permit, i.e. illegally, if necessary, from the Komga to the Kentani district to which Nosoliti had moved. Nosoliti did not obtain the consent of her minor son's guardian to this arrangement. Defendant wrongfully used or disposed of certain of these cattle and their progeny for his own purposes. There was nothing in the evidence to indicate that the Plaintiff was aware that Nosoliti contemplated the transaction in question or that he was a party thereto.

The Commissioner held that as Nosoliti had entered into the illegal transaction with the Defendant for the benefit of her minor son, the Plaintiff, in her capacity as the administering guardian of his property and that as the Plaintiff had taken no action to prevent her from doing so, he was *in pari delicto* and that the dictates of public policy required that the Plaintiff should be denied the relief sought by him. The Commissioner was also of the opinion that it was not competent for the Plaintiff to bring his case in the form of a vindicatory action seeing that the Defendant was no longer in possession of the cattle when the proceedings were instituted.

Held: That under Bantu Law and Custom it is not competent for a widow to bind her minor son by any agreement as regards his cattle in the absence of his guardian's consent thereto so that his case against the person with whom the widow entered into such agreement cannot be regarded as tainted by any illegality therein.

Held further: That it is open to such minor to bring a vindicatory action for the recovery of his stock against the person with whom his mother entered into the agreement thereto even though such person has disposed of the stock where such disposal is wrongful.

Cases referred to:

Nobamjwa vs. Myuyu, 1948 N.A.C. (C. & O.) 7, at page 9.
Ndlala d.a. vs. Makinana, 1963 (1) P.H., R.5 (S.).
Aspeling N.O. vs. Joubert, 1919 A.D. 167, at page 171.
Mayekiso vs. Mayekiso, 1944 N.A.C. (C. & O.) 30, at page 31.

Appeal from judgment of Bantu Affairs Commissioner's Court, Kentani

Balk (President):

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court dismissing the summons with no order as to costs at the close of the Plaintiff's case on the application of the Defendant's attorney in an action in which the Plaintiff, a minor, duly assisted, sued the Defendant for certain five head of cattle or their value, R200, averring in the particulars of claim in the summons that the Defendant had been entrusted with the custody of these cattle by his (Plaintiff's) mother, Nosoliti, that two of them had died, that there were two progeny and that the Defendant had without reference to Nosoliti disposed of the five head of cattle remaining and converted the proceeds thereof to his own use.

In his plea the Defendant alleged that the three head of cattle remaining after the two had died were sold at the instance of Nosoliti before they had any progeny and that the proceeds thereof were handed to her.

The appeal is brought by the Plaintiff on the following grounds:—

"1. That the Judicial Officer erred in law in that at the close of Plaintiff's case there was sufficient evidence upon which a reasonable man might have found for Plaintiff;

2. That the Judicial Officer erred in holding that Appellant acted *in pari delicto* in the dealings which Nosoliti had with Respondent in regard to the cattle in dispute;

3. That generally the judgment is against the weight of evidence and the probabilities of the case."

As the Commissioner dismissed the summons which is tantamount to a decree of absolution from the instance, at the close of the Plaintiff's case without the Defendant having adduced any evidence or closed his case, the test to be applied is whether the plaintiff made out a *prima facie* case, see *Galela vs. Mguqulwa,* 1960 N.A.C. 55 (S), at page 56.

The case, therefore, turns on the first ground of appeal as supplemented by the second ground, the third ground not being apposite as it postulates a trial in which both parties had closed their cases.

It emerges from the evidence that the plaintiff, a minor, inherited eight head of cattle from his late father, that the surviving five head, consisting of two oxen, a cow, a bull calf and a heifer, were placed by his (Plaintiff's) mother, Nosoliti, with the Defendant so that the latter could move them without a permit, i.e. illegally, if necessary, from the Komga to the Kentani district to which Nosoliti had moved. Instead of giving effect to this arrangement, the Defendant wrongfully used or disposed of the cattle for his own purposes except for one of the oxen which died and the bull calf. He slaughtered the other ox, handed over the heifer to one Qave in settlement of a debt which he owed him and sold the cow. The Defendant took the remaining animal, i.e. the bull calf, to the Transkei, it not being clear whether he disposed of it there. There were two progeny, the heifer having calved after it had been handed over for the debt and the cow before its sale, its calf also having been sold by the Defendant. The heifer which had been handed over for the debt died.

There is nothing to indicate that the Plaintiff was aware that Nosoliti contemplated the illegal transaction or that he was in any way a party thereto and, according to the evidence, the Plaintiff's guardian, Zampo, had no knowledge thereof.

The Commissioner held that as Nosoliti had entered into the illegal transaction with the Defendant for the benefit of her minor son, the Plaintiff, in her capacity as the administering guardian of his property and as the Plaintiff had taken no action to prevent her from doing so, he was *in pari delicto* and that the dictates of public policy required that the Plaintiff should be denied the relief sought by him. But, as submitted by Mr. Chisholm in his argument on behalf of the Appellant, in coming to this conclusion the Commissioner lost sight of the fact that under Bantu law and custom which, as is common cause, obtains in the instant case, it was not competent for Nosoliti to bind the Plaintiff by any agreement as regards his cattle in the absence of the consent thereto of Zampo who was the Plaintiff's guardian according to the legal system obtaining, see *Nobamjwa vs. Myuyu,* 1948 N.A.C. (C. & O.) 7, at page 9, *Ndala d.a. vs. Makinana,* 1963 (1) P.H., R. 5 (S.).

The Commissioner states in his reasons for judgment that at the time Nosoliti entered into the illegal transaction with the Defendant there was no known and available guardian but this finding is not supported by the evidence from which it is manifest that Nosoliti was then aware that Zampo was the Plaintiff's guardian and of Zampo's whereabouts. It is true that Nosoliti stated that Zampo took no interest in her late husband's affairs but this aspect is of no moment as it is implicit in her evidence that she did not approach him for his consent to the transaction. In the circumstances it is unnecessary to consider, in the light of *Tjollo Ateljees (Eiens.) Bpk. vs. Small,* 1949 (1) S.A. 856 (A.D.), at pages 879 and 880, cited by Mr. Chisholm, to what extent the Plaintiff would have been entitled to relief had his guardian consented to the illegal transaction.

The Commissioner also erred in holding against the Plaintiff his failure to take action to prevent Nosoliti from entering into the illegal transaction as this aspect was not canvassed in the evidence and there is, as pointed out above, nothing to indicate that the Plaintiff was aware that Nosoliti contemplated that transaction or that he was in any way a party thereto.

The plaintiff's case cannot, therefore, be regarded as tainted by the illegal transaction and the Commissioner was not justified in holding that the Plaintiff was *in pari delicto.*

The Commissioner was also of the opinion that it was not competent for the Plaintiff to bring his case in the form of a vindicatory action seeing that the Defendant was no longer in possession of the cattle when the proceedings were instituted. This defence was, however, not pleaded by the Defendant and in any event it was not competent for him to avail himself thereof in that, as is apparent from the evidence, the disposal of the cattle by him was a wrongful act, see *Aspelling N.O. vs. Joubert,* 1919 A.D. 167, at page 171, where this principle was invoked; see also *Mayekiso vs. Mayekiso,* 1944 N.A.C. (C. & O.) 30, at page 31.

It follows that the plaintiff made out a *prima facie* case and that the Commissioner was wrong in decreeing absolution from the instance at the close thereof.

The appeal should accordingly be allowed, with costs, and the judgment of the Bantu Affairs Commissioner's Court altered to one refusing the application for absolution from the instance and the case remitted to that Court for trial to a conclusion.

Yates and Potgieter, Members, concurred.

For Appellant: Mr. E. C. Chisholm of Umtata.
For Respondent: Mr. K. Muggleston of Umtata.

SOUTHERN BANTU APPEAL COURT.

MJANTSHI *vs.* **PAMLA.**

CASE No. 19 OF 1963.

UMTATA: 24th September, 1963. Before Balk, President, Yates and Warner, Members of the court.

PRACTICE AND PROCEDURE.

Necessity for presiding judicial officer to record nature and outcome of applications. Pleadings—proposed amendment of having effect of withdrawing an admission—necessity for satisfactory explanation.

BANTU LAW AND CUSTOM.

Seduction and pregnancy—failure of girl to report pregnancy to her people as also discrepancies in Plaintiff's evidence of little importance where Court properly finds that Defendant had sexual intercourse with girl.

Summary: Plaintiff (now Respondent) obtained judgment in a Chief's Civil Court in an action in which he claimed damages from the Defendant (present Appellant) for the seduction and pregnancy of his (Plaintiff's) ward, Nongqubungu.

An appeal by the Defendant to a Bantu Affairs Commissioner's Court was dismissed and the matter was thereupon brought on appeal to this Court.

At the commencement of the hearing in the Commissioner's Court, the Defendant's attorney filed a notice of application to amend the Defendant's plea as restated in that Court by substituting a denial for the admission that the Defendant was Nongqubungu's guardian and as such entitled to institute the action. The Commissioner's notes of the proceedings did not disclose whether the Defendant's attorney pursued the application nor whether it was granted or refused by the Court but from the fact that the issue raised by the proposed amendment, i.e. the Plaintiff's *locus standi in judicio*, was thereafter canvassed in the evidence and decided upon by the Court it was assumed that the application for the amendment was in fact made by the Defendant's attorney and granted by the Court. The amendment in question had the effect of withdrawing an admission but no explanation of the circumstances in which the admission was made and the reasons why it was sought to withdraw it, was offered. The Defendant in his evidence did not deny the evidence of Nongqubungu and the go-between that he had had intercourse with her nor that of two of Plaintiff's witnesses that he had admitted to them that he had had an affiair with Nongqubungu but sought instead to prove that one Sityuze and not he was responsible for Nongqubungu's pregnancy. In support of his argument for the Appellant the latter's attorney stressed the fact that Nongqubungu failed to report her pregnancy to her people and also drew attention to certain discrepancies in the evidence for the Plaintiff and contended that the fact that Nongqubungu had not told the truth when stating in her evidence that she did not know Sityuze, indicated that she was unworthy of credence.

Held: That Bantu Affiairs Commissioners are required in terms of paragraph (*d*) of sub-rule (1) read with sub-rule (3) of Rule 55 of the Rules for their Courts, to make notes of the whole of the proceedings in civil matters heard by them including applications and the outcome thereof.

Held further: That when the proposed amendment of a plea has the effect of withdrawing an admission, a satisfactory explanation of the circumstances in which the admission was made and the reason why it is sought to withdraw it, is required before the application is granted.

Held further: That the failure of a girl to report her pregnancy to her people, as also discrepancies in the evidence for the Plaintiff assume little importance where the Court properly finds that the Defendant had sexual intercourse with the girl for such a finding has the consequence of making it incumbent on Defendant to show by satisfactory evidence that he is not in fact the cause of the girl's pregnancy if he is to avoid liability therefor.

Held further: That in the circumstances of this case it did not follow that the girl was unworthy of credence because of an untruth in her evidence.

Cases referred to:

Ngombane vs. Mankayi, 1956 N.A.C. 115 (S) at page 117.

Mgoma vs. Kulati and Another, 1956 N.A.C. 198 (S), at page 200.

Watersmeet (Pty.), Ltd. vs. de Kock, 1960 (4) S.A. 734 (E).

Bacela vs. Mbontsi, 1956 N.A.C. 61 (S), at page 68.

Appeal from judgment of Bantu affairs Commissioner's Court, Elliotdale.

Balk (President):

This case had its inception in a Chief's Civil Court which gave judgment, for the Plaintiff as prayed, with costs, in an action in which he claimed five head of cattle or R100 from the Defendant as damages for the seduction and pregnancy of his ward, Nongqubungu.

An appeal by the Defendant from that judgment to the Bantu Affairs Commissioner's Court was dismissed, with costs.

The appeal to this Court by the Defendant from the judgment of the Commissioner's Court is confined to fact.

At the commencement of the hearing in the Commissioner's Court, the Defendant's attorney filed a notice of application to amend the Defendant's plea as restated in that Court by substituting a denial for the admission that the Defendant was Nongqubungu's guardian and as such entitled to institute the action. The Commissioner's notes of the proceedings do not disclose whether the Defendant's attorney persued the application nor whether it was granted or refused by the Court but from the fact that the issue raised by the proposed amendment, i.e. the Plaintiff's *locus standi in judicio*, was thereafter canvassed in the evidence and decided upon by the Court it is assumed that the application for the amendment was in fact made by the Defendant's attorney and granted by the Court. In this connection it must again be emphasized that Bantu Affairs Commissioners are required in terms of paragraph (*d*) of sub-rule (1) read with sub-rule (3) of Rule 55 of the Rules for their Courts, to make notes for the whole of the proceedings in civil matters heard by them including applications and the outcome thereof, see *Ngombane vs. Mankayi*, 1956 N.A.C. 115 (S), at page 117, and *Mgoma vs. Kulati and Another* 1956 N.A.C. 198 (S), at page 200.

As the amendment of the Defendant's plea had the effect of withdrawing an admission, a satisfactory explanation of the circumstances in which the admission was made and the reasons why it is sought to withdraw it, is required before the application is granted, see *Watersmeet (Pty.), Ltd. vs. de Kock*, 1960 (4) S.A. 734 (E). No explanation in these respects appears to have been offered. It is, however, unnecessary to pursue this aspect as it was not raised.

The Court found that the Plaintiff was in fact Nongqubungu's guardian and therefor had *locus standi in judicio*. The only evidence adduced on this issue is that *pro* and *con* by the parties themselves. It is, however, manifest from the evidence that the Plaintiff was a close relative of Nongqubungu's late father, Ngcibeni, whereas the Defendant was young at the time of Ngcibeni's death, which, as conceded by Mr. Muggleston in the course of his argument for the Appellant, lends weight to the Plaintiff's version that Ngcibeni left no male issue and that he (Plaintiff) was his heir. Moreover, there is this improbability in the Defendant's case which was relied upon by the Commissioner, viz., that the defendant did not raise the *locus standi* issue in the Chief's Court notwithstanding that, according to his evidence in the Commissioner's Court, he was then aware that the Plaintiff was not Nongqubungu's guardian and he gave no explanation of his failure to do so. Consequently the Commissioner's finding in the Plaintiff's favour on this issue cannot be said to be wrong.

Turning to the Commissioner's finding that the Plaintiff had established the alleged seduction and pregnancy, Nongqubungu's evidence that the Defendant seduced her and rendered her pregnant is supported not only by the evidence for the Plaintiff of the go-between, Nongxalane, but also by his witnesses, Percy Qondovu and Headman Runuza, that the Defendant had admitted to them that he had had an affair with Nongqubungu. The Commissioner was justified in finding that the Plaintiff had made this admission and that he had had sexual intercourse with Nongqubungu as the Defendant did not deny either the admission or the intercourse in his evidence.

Admittedly, as stressed by Mr. Muggleston, there is a discrepancy between Nongqubungu's evidence and that of Nongxalane as to how long the affair between the former and the Defendant lasted. There are also other discrepancies in the evidence for the Plaintiff but these are of a minor nature. In addition there appears to be an inconsistency in Nongqubungu's evidence as regards whether she had intercourse with the Defendant whilst she was at Bewula's kraal.

There is also, as pointed out by Mr. Muggleston, the fact that Nongqubungu did not report her pregnancy to her people and gave no explanation of her failure to do so which in general is adverse to a Plaintiff's case.

This feature and the discrepancies in the evidence for the Plaintiff, however, assume little importance in the light of the Commissioner's finding that the Defendant had intercourse with Nongqubungu which, for the reasons given above, cannot be gainsaid; for such a finding has the consequence of making it incumbent on the Defendant to show by satisfactory evidence that he is not in fact the cause of the women's pregnancy if he is to avoid liability therefor, see *Bacela vs. Mbotsi*, 1956 N.A.C. 61 (S), at page 68.

Mr. Muggleston, however, contented that Nongqubungu was unworthy of credence in that she had denied that she knew Sityuze whereas it was clear from the Plaintiff's witness, Nontwazana, that Nongqubungu did in fact know him. There can be little doubt that Nongqubungu did not tell the truth in this respect but it does not necessarily follow therefrom that she was unworthy of credence as she may well have been prompted to make this false denial by fear of prejudicing the Plaintiff's case. That this is the position gains support from the fact that the introduction of Sityuze as Nongqubungu's lover was a last-minute resort by the Defendant to escape liability for her pregnancy for which he was responsible as is evident from the statement in the Chief's reasons for judgment that in the Chief's Court the Defendant had stated that he did not know who had made love to Nongqubungu whereas in the Commissioner's Court he sought to prove that it was Sityuze and stated he was aware of this affair at the time of the hearing in the Chief's Court. Admittedly, the Defendant stated in the Commissioner's Court that he had mentioned Sityuze in the Chief's Court but little weight can be

attached to this evidence as the witness, Nobafazi, called by him in the Commissioner's Court to substantiate that Sityuze had been Nongqubungu's lover was not called as a witness in the Chief's Court notwithstanding that she was then available. This reason also warranted the Commissioner's rejection of Nobafazi's evidence. The evidence of the remaining defence witness, i.e. Kwedini, does not advance the Defendant's case as it is obviously based on hearsay and conjecture. There remains only the Defendant's evidence denying that he had rendered Nongqubungu pregnant which does not suffice to establish that allegation, see *Bacela's* case (*supra*), at page 68.

It follows that Nongqubungu cannot be said to be unworthy of credence and that the Defendant failed to show that he was not the cause of her pregnancy.

The Commissioner can therefore not be said to be wrong in finding for the Plaintiff and the appeal should accordingly be dismissed, with costs.

Yates and Warner, Members concurred.

For Appellant: Mr. K. Muggleston of Umtata.

For Respondent: Mr. M. G. Airey of Umtata.

SOUTHERN BANTU APPEAL COURT.

MBONDA *vs.* **NKCENKCE.**

N.A.C. CASE No. 53 OF 1962.

KING WILLIAM'S TOWN: 1st July, 1963. Before Yates, Acting President, Young and Leppan, Members of the Court.

DAMAGES.

Damages for assault—liability of co-defendant when latter's action not direct cause of injuries forming basis of claim for damages—Apportionment of Damages Act.

Summary: Damages were awarded against two Defendants jointly and severally for injuries suffered by Plaintiff as a result of an assault in which he lost his left eye and suffered multiple injuries to his mouth and head. It was common cause that the only injury inflicted by Defendant No. 2 on the Plaintiff was a blow to the head with a stick as a result of which Plaintiff was knocked dizzy. It was submitted that as Defendant No. 1 caused all the injuries he alone was liable for the damages.

Held: That as the blow to the Plaintiff's head by Defendant No. 2 had knocked him dizzy and enabled Defendant No. 1 to inflict the injuires, Defendant No. 2's action was not too remote for him to be held jointly and severally liable for the damages claimed. He was an active participant in the assualt from which the injuries resulted. If it had been desired to have the damages apportioned between the Defendants then application should have been made either in the pleadings or at some stage during the course of the trial in terms of the Apportionment of Damages Act, No. 34 of 1956.

Cases referred to:

Law of Delict by McKerron (Fifth Edition) at page 113.

Seitowitz vs. Provincial Insurance Co., Ltd., 1962 (3), S.A., 443, page 445.

Section *two* (8) (*a*) (i) of The Apportionment of Damages Act, No. 34 of 1956.

Yates (Acting President):—

This is an appeal from a Bantu Affairs Commissioner's Court in a case in which Plaintiff (present Respondent) sued two Defendants jointly and severally for damages amounting to R400 which he alleged he had suffered as a result of an assault by them in which he had lost his left eye and sustained multiple injuries to his mouth and head. The damage was detailed as:—

	R c
(*a*) Hospital expenses—paid to Uitenhage Provincial Hospital	3 00
(*b*) Paid Uitenhage Hospital for glass eye	4 20
(*c*) Travelling expenses (train fare)	5 07
(*d*) Paid Dr. Oosthuizen for injections	10 00
(*e*) Loss of earnings for three (3) months at R28 per month	84 00
(*f*) Shock, pain, suffering, discomfort, inconvenience, loss of amenities, future discomfort and inconvenience	293 73
TOTAL	400 00

The Defendants both denied that they had assaulted Plaintiff and pleaded self-defence. Second Defendant (present Appellant) admitted, however, that he had struck Plaintiff one blow on his head with a stick.

Defendant No. 1 did not appear to defend the case and at the conclusion of the hearing the Bantu Affairs Commissioner granted judgment for Plaintiff as prayed, with costs against both Defendants.

Defendant No. 2 has now appealed on grounds of fact and of law which it is unnecessary to set out in detail in view of what follows.

Mr. Anderson who appeared on behalf of Appellant contended first of all that the judicial officer had erred in allowing the Plaintiff's attorney to recall the Plaintiff at the close of his case and after Defendant's attorney had applied for absolution from the instance on the ground that no damages had been claimed against the second Defendant. However, the failure of Plaintiff's attorney to lead formal evidence in this regard is, to my mind, a mere technicality, seeing that the claim for damages was the basis of the action; and Defendant was not prejudiced by the fact that Plaintiff's attorney did not lead this evidence before the close of his case. In addition rule 53 (11) of the rules for Bantu Affairs Commissioner's Courts (Government Notice No. 2886 of 1951), expressly provides that either party may with the leave of the court adduce further evidence at any time before judgment.

In regard to Mr. Anderson's further contention that the judicial officer erred in calling the clerk of the court to put in as an exhibit the record of the criminal case in which the parties were concerned, Rule 53 (13) of the same rules provides that "any witness may be examined by the court as well as by the parties and that the court may of its own motion call witnesses not called by either party if it thinks the evidence is necessary in order to elucidate the truth or for the solution of the question before it." The evidence contained in the criminal record had no probative value as it was merely hearsay for the purposes of the civil action, see *The Law of Evidence* by Scoble (Third Edition) at page 405 and the authorities there cited. However, it is not clear whether or not the Commissioner was influenced by the evidence contained therein but if he was, he was clearly at fault. This Court, however, in the circumstances, is in a position to evaluate the admissible evidence and to come to a decision thereon.

Mr. Anderson's main submission was that there was no evidence whatever indicating that Defendant No. 2 was responsible for any of the damages itemized in the claim and that the loss of Plaintiff's eye, his facial injuries, his loss of earnings and general damages were all attributable to the action of Defendant No. 1. In other words he argued that the injuries sustained by Plaintiff were too remote to be attributable to the acts of Defendant No. 2. There is a conflict of opinion as to the true test of remoteness but taking the line of thought most favourable to Defendant No. 2 i.e. that a wrongdoer is liable only for the natural and probable consequences of his act and that for improbable consequences which he could not reasonably have foreseen he cannot be responsible [see the *Law of Delict* by McKerron (Fifth Edition) at page 113], it seems to me that Defendant cannot escape liability. Mr. Anderson conceded that Defendant No. 2 struck Plaintiff on the head and as a result of this blow the latter was knocked dizzy. It is clear from the evidence that that blow enabled Defendant No. 1 to renew his attack and to inflict the injuries described above. I agree with the conclusion reached by the Commissioner in his reasons for judgment that had Plaintiff not received the blow on his head by Defendant No. 2 he would have been able to repel the attack of Defendant No. 1 and, therefore, indirectly Defendant No. 2 was as much responsible for the injuries inflicted on the Plaintiff as was Defendant No. 1. This being so I do not agree with the further statement of the Commissioner that it is clear that Defendant No. 2 caused less damage to Plaintiff than Defendant No. 1. In my view both were equally responsible. Defendant No. 2 was a participant in the assault on Plaintiff and the latter's injuries resulted directly from that assault. It might as well be argued that if I run into a pedestrian with my motor car and he is thrown in front of an on-coming tram-car I would not be liable for the injuries he sustained, see *S.A.R. vs. Edwards,* 1930 (A.D.) 3. It was not argued before this Court at any stage that Defendant No. 2 should escape liability by reason of the fact that he acted in self-defence, nor were there any independent intervening causes which could be held responsible.

Mr. Anderson further contended that there was no joint action against Plaintiff by the Defendants and that there was no common purpose and in this regard cited the case of *Rex v. Garnsworthy and Others* W.L.D., 1923 at page 17. However, that case deals solely with the criminal law aspect of collective responsibility and in my view is not apposite in the instant case. In view of the circumstances of the assault there can be no doubt that the Defendants were joint wrongdoers and jointly responsible for the same damage which all resulted from the assault by the two Defendants. Section *two* (8) (*a*) (i) of the *Apportionment of* Damages Act, No. 34 of 1956, provides that the court may order that such joint wrongdoers pay the amount of damages awarded jointly and severally; and this the court *a quo* has done. If it had been desired to have the damages apportioned between the Defendants then application could have been made to that effect either in the pleadings or at some stage during the course of the trial, see *Saitowitz vs. Provincial Insurance Co., Ltd.*, 1962 (3) S.A. 443 at page 445.

This disposes of the contentions put forward by Mr. Anderson in favour of the appeal.

The other grounds enumerated in the lengthy notice of appeal were not argued.

The appeal should, therefore, be dismissed, with costs.
Young and Leppan, Members, concurred.

For Appellant: Mr. M. Anderson of King William's Town.
For Respondent: In person.

SOUTHERN BANTU APPEAL COURT.

LUWACA *vs.* SKUNI AND ANO.

CASE No. 26 OF 1963.

UMTATA: 26th September, 1963. Before Balk, President, Yates and Warner, Members of the Court.

PRACTICE AND PROCEDURE.

Absolution judgment—when competent to enter. Evidence—standard of proof required in cases of misconduct.

Summary: The facts appear from the President's judgment.

Held: That where the probabilities favour neither side absolution from the instance ought to be decreed.

Held further: That the standard of proof in civil cases based on misconduct is proof on a preponderance of probability with this qualification that in deciding whether there is a sufficient balance of the probabilities that the alleged misconduct took place, the general improbability of such an occurrence, dictated by moral and legal sanctions against it, is a factor to be taken into account. The higher standard of proof i.e. proof beyond a reasonable doubt is peculiar to criminal cases and has no place in civil matters which all fall to be decided on a preponderance of probability.

Cases referred to:

Wali vs. Hlakahlela, 1961 N.A.C. 55 (S).
Dawedi vs. Buwa, 1961 N.A.C. 25 (S), at page 26.
Gcukumani vs. N'Tshekisa, 1958 N.A.C. 28 (S), at page 29.
Van Lutterveld vs. Engels, 1959 (2) S.A. 699 A.D., at page 702.
Van der Schyf vs Loots, 1938 A.C. 137, at page 145.

Appeal from judgment of Bantu Affairs Commissioner's Court, Umtata.

Balk (President):

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court for the two Defendants (now Respondents) in an action in which the Plaintiff (present Appellant) sued them for five head of cattle or their value, R150, as damages for adultery with his wife, Nowongile, citing the first Defendant as the *tort-feasor* and the second Defendant on the ground that the first Defendant was an inmate of his (second Defendant's) kraal.

The onus of proof on the pleadings rested on the Plaintiff as the Defendants denied the alleged adultery therein.

The appeal is confined to fact.

As pointed out by the presiding Assistant Bantu Affairs Commissioner in his reasons for judgment there is only the evidence of Nowongile for the Plaintiff in support of the alleged adultery against that of the first Defendant denying it. That being so and as there appear to be no probabilities or improbabilities as disclosed by the evidence to be material, which indicate that the truth lies with Nowongile or the first Defendant, neither party established his case and the Commissioner should accordingly have decreed absolution from the instance, with costs, and not have entered a final judgment for the Defendants, as was submitted by Mr. Muggleston in his argument on behalf of the appellant, see *Wali vs. Hlakahlela,* 1961 N.A.C. 55 (S).

The Commissioner ought not to have admitted statements by the witnesses as to what the alleged go-between, Nowisile, who was not called to testify, had said at the Defendant's kraal and before the sub-headman and headman as such statements were hearsay.

Again, as is evident from the Commissioner's reasons for judgment he applied a higher standard of proof than warranted in deciding the case, i.e. proof beyond a reasonable doubt, which is the standard peculiar to criminal cases, instead of proof on a preponderance of probability which is the standard in all civil matters with this qualification that in cases such as the present in deciding whether there is a sufficient balance of the probabilities that the alleged misconduct took place, the general improbability of such an occurrence, dictated by moral and legal sanctions against it, is a factor to be taken into account, see *Dawedi vs. Buwa,* 1961 N.A.C. 25 (S), at page 26, *Gcukumani vs. N'Tshekisa,* 1958 N.A.C. 28 (S), at page 29 and *Van Lutterveld vs. Engels,* 1959 (2) S.A. 699 A.D., at page 702.

The alteration of the judgment from one for the Defendants to a decree of absolution from the instance appears to be one of substance and not merely one of form as the evidence indicates the probability of the Plaintiff being able to adduce further testimony in support of the alleged adultery, viz., that of the alleged go-between, Nowisile, so that the Appellant is entitled to costs of appeal, see *Wali's* case (*supra*), at page 56 and *Van der Schyf vs. Loots,* 1938 A.D. 137, at page 145.

In the result the appeal should be allowed, with costs, and the judgment of the Bantu Affairs Commissioner's Court altered to one of absolution from the instance, with costs.

Yates and Warner, Members, concurred.

For Appellant: Mr. K. Muggleston of Umtata.
For Respondents: Mr. F. G. Airey of Umtata.

SOUTHERN BANTU DIVORCE COURT.

MACALENI *vs.* **MLANGANA.**

CASE No. 565 OF 1963.

CAPE TOWN: 14th November, 1963. Before Balk, President.

HUSBAND AND WIFE.

Jurisdiction of Bantu Divorce Courts to hear applications for variation of orders of their Courts in regard to the award of custody of minor children—manner in which such applications to be brought—issues in applications of this nature fall to be decided by viva voce *evidence and affidavits filed by parties serve as their pleadings and no more.*

Summary: This was an application for variation of the order of this Court awarding the custody of the minor child of the parties to its mother, the Respondent, on dissolution by this Court of their marriage on the 20th July, 1962, as a result of a trial at which both parties appeared. The variation applied for was the award of the custody of the child to its father, the applicant, *in lieu* of the Respondent and was sought on the ground of altered circumstances which arose after the order was made.

In limine the Respondent's attorney excepted to the application on four grounds, viz.—

(1) that this Court had not jurisdiction to entertain an application of this nature;

(2) that the proceedings had been brought in the wrong form in that they should have been instituted by way of summons and not by way of application;

(3) that the allegation by the applicant in support of the variation had been set out for the first time in his affidavit replying to the Respondent's opposing affidavit instead of in his initial affidavit filed in support of the application; and

(4) that the last allegation in paragraph 9 of the applicant's replying affidavit was hearsay.

In disallowing the Respondent's attorney's exceptions to the application the President reasoned as follows:—

"Dealing with these points *seriatim*, it is true that there is no specific provision in section *ten* of Act No. 9 of 1929, as amended, under which this Court is constituted, or in the Rules of this Court, providing that it shall have jurisdiction in proceedings of the nature here in question in all cases but, to my mind, such jurisdiction is necessarily implied in the provision in sub-section (1) of that section empowering this Court to hear and determine suits of nullity, divorce and separation between Bantu domiciled in its area of jurisdiction in respect of marriages and to decide any question arising therefrom, bearing in mind that it is implicit in an order pertaining to the custody of children that leave is given to either of the parties to apply again to alter its terms or to set it aside, see *Eckard vs. Olvott*, 1962 (4) S.A. 189 (O), at page 190; for were it otherwise, no Court would have jurisdiction to entertain such proceedings as at common law it is only the Court which granted the original order that has power to amend it on the ground of altered circumstances which arose after it was made as such new circumstances cannot form a ground of appeal or review to a higher court, see *Eckard's* case and *Bergh vs. Coetzer and Minister of Social Welfare*, 1963 (2) P.H. F.81 (C). That this Court has this power is further borne out by the fact that section *five* of the Matrimonial Causes Jurisdiction Act, 1939 (Act No. 22 of 1939), which together with the remaining provisions of that Act apply to this Court by virtue of section *five* of Act No. 42 of 1942, provides for the amendment by this Court of custody orders made by it in respect of children in divorce proceedings brought under the extended jurisdiction conferred on it by sections *one* and *four* of Act No. 22 of 1939 and it is inconceivable that the legislature should have intended to restrict the amendment of such orders to cases brought under the extended jurisdiction and thus exclude cases under the Court's ordinary jurisdiction. I therefore come to the conclusion that there is no substance in the submission that this Court has no jurisdiction to entertain the instant application.

Whilst the rules of this Court are silent as regards the mode of institution of proceedings of the nature here in question, the fact that Rule 34 of the rules of this Court provides that the proceedings for variation of judgments of this Court on other grounds, i.e. on the grounds specified in that Rule, are to be brought by way of application in my view affords sufficient indication that the instant proceedings are to be brought in that manner for there is no good reason for differentiation in this respect. In any event that is the practice of this Court. Accordingly the institution of the instant proceedings by way of application is in order.

It seems to me from a scrutiny of the papers that the instant application turns in the main on the applicant's allegation that after this Court had awarded the custody of the child to the Respondent and after she had obtained the child from the applicant and had kept it for a time in Cape Town, she sent the child to her mother in Middledrift in whose care the child still is, whilst she continued to reside in Cape Town. This allegation is set out in paragraph 10 of applicant's initial affidavit and is merely amplified in his replying affidavit so that the application is in order in this respect as well.

It is true that the last allegation in paragraph 10 of the applicant's replying affidavit to the effect that he had learnt from his brother that the child was in a neglected and unkempt condition is hearsay. This, however, is not a good reason for striking out the allegation for, as pointed out in the judgment of this Court in *Mahlangeni vs. Mahlangeni*, 1959, N.A.C. 33 (S), the issues in applications of this nature fall to be decided by *viva voce* evidenee and not on affidavit and the affidavits filed by the parties in such applications serve as their pleadings and no more.

It follows from what I have said that the points advanced by the Respondent's attorney *in limine* are answered in favour of the applicant and the Court will hear such *viva voce* evidence as may be tendered by the parties in support of their contentions."

Cases referred to:

Eckard vs. Olyott, 1962 (4), S.A. 189 (O) at page 190.

Berg vs. Coetzer and Minister of Social Welfare, 1963 (2), P.H. F. 81 (C).

Mahlangeni vs. Mahlangeni, 1959, N.A.C. 33 (S).

Statutes referred to:

Section ten *of Act No.* 9 *of* 1929.
Sections one, four *and* five *of Act No.* 22 *of* 1939.

For Applicant: Mr. S. O. Beinart of Cape Town.
For Respondent: Mr. P. Wiener of Cape Town.

SOUTHERN BANTU APPEAL COURT.

GQABI *v.* **STEMELE.**

CASE No. 15 OF 1963.

UMTATA: 16th September, 1963. Before Balk, President Yates and Potgieter, Members of the Court.

PRACTICE AND PROCEDURE.

Appeals from Courts of Bantu Affairs Commissioner's—necessity for careful checking of copies of records.

The following is an excerpt from the President's judgment, the remainder of that judgment not being material to this report:—

"A further matter calls for mention, viz., an error in a most material respect in the certified copies of the record of the case. This error came to light on reference being made to the original record by this Court in view of the glaring inconsistency occasioned thereby, i.e. by the erroneous insertion of the word 'not' in the following sentence of Njeya's evidence— 'After I received the £30 I did (not) go to him again—three times I went back to him'. The necessity

for a careful check of the copies of records by clerks of court or other officers entrusted with this duty before they are certified by them, cannot be overemphasized, as an error of the nature in question may result in a miscarriage of justice."

Yates and Potgieter, Members, concurred.

SOUTHERN BANTU APPEAL COURT.

TSHIKI *vs.* **RAMNCWANA.**

N.A.C. CASE No. 7 OF 1963.

KING WILLIAM'S TOWN: 5th July 1963. Before Yates, Acting President, Young and Leppan, Members of the Court.

MAINTENANCE.

Maintenance of illegitimate child—both natural father and mother of illegitimate child liable for its support according to their means.

Summary: The following is an excerpt from the judgment of the Acting President, the remainder of that judgment not being material to this report:—

> "In regard to the second ground of appeal, according to common law, the father of an illegitimate child and likewise the mother are bound to support it if they have the means thereto, see *Yokwana vs. Bolsiki,* 1963 (1) P.H. R. 9 and the authorities there cited.
>
> In the instant case, which is in essence an enquiry, see section *three* of Act No. 7 of 1895, the Commissioner has only heard the evidence in regard to the appellant's earnings and expenditure, and has awarded as maintenance an arbitrary amount which he considered the latter should be able to pay when he is working. He has not investigated how much the actual requirements for the support of the child are nor whether the mother is in a position to contribute towards its maintenance as she is required to do if she is so able. The case of *Tungata vs. Bbobi,* 1962 (1 and 2) N.A.C. 7 (S) is instructive in this regard.
>
> In the circumstances this Court is not in a position to assess the amount of maintenance which should be paid. The order in regard to maintenance should, therefor, be set aside and the case remitted to the court *a quo* for the hearing of further evidence in this regard and a fresh order in the light thereof.

Cases referred to:—

Yokwana vs. Bolsiki, 1963 (1) P.H. R.9.

Tungata vs. Mbobi, 1962 (1 and 2) N.A.C. 7 (S).

SOUTHERN BANTU APPEAL COURT.

MBIZA *vs.* **DEVETE d/a.**

CASE No. 13 OF 1963.

UMTATA: 23rd September, 1963. Before Balk, President, Yates and Warner, Members of the Court.

BANTU LAW AND CUSTOM.

Customary union—dissolution of—necessary requirements for a tender to refund dowry to be valid.

Summary: The first Plaintiff duly assisted by her "dowry eater", *inter alia,* successfully sought an order in a Bantu Affairs Commissioner's Court confirming the dissolution of her customary union with the Defendant, which dissolution she alleged had been brought about by the tender to the latter of a refund of part of the dowry paid for her.

The only evidence in regard to the tender was that it was made by way of a letter to the Defendant.

Held: That, as in Pondo law so in Tembu law, for a tender to *keta* dowry, i.e. to refund it for the purpose of the dissolution of a customary union, to be valid, the stock or its equivalent must be taken or sent to the husband.

Cases referred to:

Mfazwe vs. Mfikili, 1957 N.A.C. 33 (S), at pages 35 and 36.

Appeal from judgment of Bantu Affairs Commissioner's Court, Mqanduli.

Balk (President:

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court for the two Plaintiffs (now respondents) as prayed, with costs, and dismissing the Defendant's (present Appellant's) counterclaim, with costs, in an action in which the first Plaintiff, duly assisted by her "dowry-eater", the second Plaintiff, sought an order confirming the dissolution of her customary union with the Defendant brought about by the tender to the latter of a refund of part of the dowry paid for her. She also claimed the sum of R66.70 and a sheep and a goat, each valued at R4.00, in respect of her earnings as a herbalist at the Defendant's kraal. The second Plaintiff's claim was for the return of certain four *ubulunga* cattle or payment of their value, R44.00 each, on the ground of the dissolution of the first Plaintiff's customary union with the Defendant. The latter preferred a counterclaim against the second Plaintiff only, for an order for the return to him of the first Plaintiff within fourteen days from the date of judgment, failing which, an order dissolving the customry union between them and the return of nine head of dowry cattle or their value, R 180.

The appeal is brought on the following grounds:—

"(*a*) That the Judgment is against the weight of evidence and the facts proved in the case and against the probabilities;

(*b*) That the Judgment should have been for the Defendant or should have been a Judgment of Absolution from the Instance by virtue of the fact that a customary union wife has no *locus standi* as a litigant in an action for the return of dowry;

(c) That the Plaintiffs failed to discharge the onus upon them in establishing the amount of dowry that had been paid and that the Judgment should have been for a dissolution of the customary union and return of nine head of cattle or their value and not five head of cattle as was the Judgment of the Court."

The appeal resolves itself to one on fact on the first ground, the second ground and the first part of the third ground being without substance as there was no claim by the first Plaintiff for the return of the dowry and the amount of dowry paid for her by the Defendant is common cause. The remainder of the third ground is bad as it does not disclose the reason why the judgment stated therein should have been given.

It is common cause that the second Plaintiff is the "eater" of the first Plaintiff's dowry and that the first Plaintiff entered into a customary union with the Defendant in respect of which ten head of cattle were paid as dowry. The rest of the material averments in the claims in convention and the counterclaim were denied by the opposite parties in their pleas so that the onus of proof rested on the parties making those averments.

In her summons the first Plaintiff based her claim for an order confirming the dissolution of her customary union with the Defendant on the allegation that the return of portion of her dowry had been tendered to the Defendant. According to the evidence adduced on her behalf her attorney was instructed to make such tender by way of a letter to the Defendant. The latter initially admitted having received such a letter but later denied it explaining that he was under the impression that the summons was such a letter. Even assuming that the Commissioner was justified in holding this admission against the Defendant, the letter does not, as contended by Mr. Airey in his argument on behalf of the Appellant and properly conceded by Mr. Muggleston who appeared in this Court for the Respondents, amount to an effective tender for, as laid down in *Mfazwe vs. Mfikili,* 1957 N.A.C. 33 (S), at pages 35 and 36, for a tender of the refund of dowry to be valid the stock or its equivalent must be taken or sent to the husband. Admittedly, that decision sets out Pondo law but the same obtains in Tembu law. It follows that the tender, being ineffective, did not serve to dissolve the first Plaintiff's customary union with the Defendant so that the Defendant was entitled to judgment, with costs, in respect of this claim. The first Plaintiff was not entitled to succeed on her remaining claim, i.e. her claim for the money and small stock, as this issue resolves itself to her word against that of the Defendant with no decisive probabilities in favour of either. The legal aspect involved in this claim, viz. whether under Bantu law and custom the first Plaintiff was entitled to claim from the Defendant what she had earned during the subsistence of her customary union with him, does not call for consideration as this aspect is not covered by the grounds of appeal.

The second Plaintiff's claim which, according to his evidence, was for the refund of an *ubulunga* beast allotted by him to the first Plaintiff and its three progeny also failed as the liability to refund was in terms of his claim contingent upon the dissolution of the first Plaintiff's customary union with the Defendant.

Turning to the counterclaim which for its success was contingent upon the Defendant having *putumaed* the first Plaintiff after she had left his kraal, see *Sibovana vs. Dlokova* 1 N.A.C. (S.D.) 281, the Defendant's testimony that he had done so was denied by both the plaintiffs in their evidence and there appears to be no preponderance of probability in the Defendant's favour so that he is not entitled to succeed on the counterclaim, as submitted by Mr. Muggleston and conceded by Mr. Airey.

In the result the appeal should be allowed, with costs, and the judgment of the Bantu Affairs Commissioner's Court altered to read as follows:—

"On the first claim in convention by the first Plaintiff and on the claim in convention by the second Plaintiff, for Defendant, with costs. On the second claim in convention by the first Plaintiff and on the counterclaim, absolution from the instance, with costs."

Yates and Warner, Members, concurred.

For Appellant: Mr. F. G. Airey, of Umtata.

For Respondent: Mr. K. Muggleston, of Umtata.

SOUTHERN BANTU APPEAL COURT.

ZEPE *vs.* **ZEPE.**

CASE No. 25 OF 1963.

UMTATA: 17th September, 1963. Before Balk, President, Yates and Potgieter, Members of the Court.

PRACTICE AND PROCEDURE.

Absolution judgment—test to be applied in decreeing absolution at close of Plaintiff's case. Vindicatory action—party having juridicial possession not precluded from bringing action against party having physical possession.

BANTU LAW AND CUSTOM.

Widow continuing to live at late husband's kraal entitled to have sufficient of deceased's livestock remain at latter's kraal for her maintenance—position the same in regard to livestock received as dowry for daughter after death of husband—open to heir to move to deceased's kraal or place representative thereat to take over custody of livestock.

Summary: This was an appeal from the judgment of a Bantu Affairs Commissioner's Court decreeing absolution from the instance, with costs, at the close of plaintiff's case on the application of the Defendant's attorney in an action in which the Plaintiff sued the Defendant for the delivery of certain livestock averring in the particulars of claim in the summons that he had inherited this stock from the defendant's late husband, that it was in Defendant's possession and that she had failed to deliver it to him despite due demand.

The Commissioner found that the Plaintiff had full possession and control of the stock and that the fact the stock was at the deceased's kraal where the Defendant resided did not give her either possession or control thereof. The Commissioner also held that the Plaintiff did not have the right to remove the stock from the deceased's kraal. The reasons given by the Plaintiff in his evidence for wanting to remove the stock from the deceased's kraal were that the Defendant had sold one of his cattle and spent the proceeds without his permission and that the had stated that she intended transferring the stock into the name of her child born after the deceased's death.

The Plaintiff in his evidence also stated that the stock in dispute included certain dowry which he had received for one of the deceased's daughters.

The Plaintiff appealed to this Court, *inter alia,* on a ground which admitted of the construction that the lower Court erred in finding that the Plaintiff had not made out a *prima facie* case.

Held: That in deciding whether or not absolution from the instance should be decreed at the close of the Plaintiff's case where the defendant has not adduced any evidence or closed his case the test to be applied is whether the Plaintiff made out a *prima facie* case.

Held further: That the fact that Plaintiff has juridicial possession of livestock does not preclude him from bringing a vindicatory action against the person having the *detentio,* i.e. physical control thereof.

Held further: That a widow is according to Bantu law and custom, entitled to have sufficient of her late husband's livestock remain at his kraal or at some other kraal approved of by her guardian, for her maintenance and that of her minor children whilst she continues to live thereat, so that ordinarily the heir to such live stock has no right to remove it without her consent. The same applies to live stock received as dowry for the widow's daughter after her husband's death.

Held further: That, under Bantu law and custom it is open to the heir of a deceased person to move to the deceased's kraal or place a representative thereat to take over the custody of the livestock and so exercise full control over it and prevent the deceased's widow from disposing of any of it without his consent.

Cases referred to:

Galela vs. Mguqulwa, 1960 N.A.C. 55 (S), at page 56.
Moosa vs. Constantia Motors, 1958 (2) S.A. 334 (E), at page 337.

Sonamzi vs. Nosamana, 3 N.A.C. 297.
Manyosine vs. Nonkanyezi, 1 N.A.C. 114, at page 115.
Mapoloba vs. Mapoloba, 2 N.A.C. 186, at Page 188.
Mnyanyekwa vs. Macuba, 4 N.A.C. 139, at Page 140.
Mvana vs. Mvana, 5 N.A.C. 200, at page 201.
Xatula vs. Xatula, 5 N.A.C. 212.
Zibuti vs. Zibuti, 6 N.A.C. 21, at page 22.
Mdoda vs. Toseni, 6 N.A.C. 40, at page 41.
Gqalana vs. Gqalana, 1935 N.A.C. (C. & O.) at pages 53 and 54.
Rashula vs. Masixandu, 5 N.A.C. 202, at page 203.
Sidubulekana vs. Somyalo, 1931 N.A.C. (C. & O.) 12.
Menziwa vs. Gqati, 1934 N.A.C. (C. & O.) 83, at page 84.
Myuyu vs. Nobanjwa, 1947 N.A.C. (C & O) 66, at page 68.
Mayekiso vs. Mayekiso 1944 N.A.C. (C. & O.) 30.

Appeal from judgment of Bantu Affairs Commissioner's Court, Nqamakwe.

Balk (President):

This is an appeal from the judgment of a Bantu Affairs Commissoner's Court decreeing absolution from the instance, with costs, at the close of the Plaintiff's case on the application of the Defendant's attorney in an action in which the Plaintiff (present appellant) sued the Defendant (now respondent) for the delivery of certain livestock averring in the particulars of claim in the summons that he had inherited this stock from the Defendant's late husband, Samuel Zepe (hereinafter referred to as "the deceased"), that it was in the Defendant's possession and that she had failed to deliver it to him despite due demand. The Plaintiff also acknowledged in his summons that he was liable to support and maintain the Defendant suitably in accordance with her station in life and repeated his offer to do so.

The appeal is brought on the following grounds:—

> "That the above Honourable Court erred in finding that the evidence adduced by the Plaintiff and the admissions made by the Defendant in the pleadings filed by her did not establish the Plaintiff's claim, as heir, to delivery of the assets/property in the Estate of the late Samuel Zepe and/or in further finding that Plaintiff was in full possession and control of the said assets property and was not lawfully entitled to remove the same from the kraal of the said late Samuel Zepe and the judgment was therefore bad in law and against the weight of evidence."

As the Commissioner decreed absolution from the instance at the close of the Plaintiff's case without the Defendant having adduced any evidence or closed his case, the test to be applied is whether the Plaintiff made out a *prima facie* case, see *Galela vs. Mguqulwa,* 1960 N.A.C. 55 (S), at page 56.

Whilst the ground of appeal that the judgment of the Commissioner's Court is bad in law for the reasons given therein is not happily worded, it seems to me that it admits of the construction that that Court erred in finding that the Plaintiff had not made out a *prima facie* case on the evidence adduced and the admissions made by the Defendant in her plea particularly as this was the Commissioner's approach to the case as is evident from his reasons for judgment. That this is the position was submitted by Mr. Chisholm and conceded by Mr. Muggleston who appeared in this Court for the appellant and respondent, respectively. The appeal was accordingly dealt with on this basis. The ground of appeal that the judgment is against the weight of the evidence is, of course, not apposite postulating, as it does, a trial in which both parties had closed their cases.

In her plea the Defendant admitted that the Plaintiff had inherited the deceased's livestock but differed as regards their number and alleged that the Plaintiff was in full possession and control thereof and that her refusal to let him remove the stock from the deceased's household did not affect his possession and control thereof.

The Commissioner found that the Plaintiff had full possession and control of the stock and that the fact that the stock was at the deceased's kraal where the Defendant resided, did not give her either control or possession thereof.

The Commissioner, however, erred in this finding in that, as is manifest from the Plaintiff's evidence, whilst he had juridicial possession of the stock, the Defendant had the *detentio* i.e. the physical control, thereof for, as testified to by the Plaintiff, the stock was in the Defendant's custody at the deceased's kraal where she and not the Plaintiff resided.

In the circumstances, the Plaintiff was not precluded from bringing the instant action, a vindicatory one, because of his possession of the stock, see the penultimate paragraph of the citation from Voet in *Moosa vs. Constantia Motors,* 1958 (2) S.A. 334 (E), at page 337.

The Commissioner held that the Plaintiff did not have the right to remove the stock from the deceased's kraal relying, *inter alia,* on *Sonamzi vs. Nosamana,* 3 N.A.C. 297.

As submitted by Mr. Muggleston, a widow is, according to Bantu law and custom, entitled to have sufficient of her late husband's livestock remain at his kraal or at some other kraal approved of by her guardian, for her maintenance and that of her minor children whilst she continues to live thereat so that ordinarily the heir to such stock has no right to remove it without her consent. That this is the position is borne out not only by the judgment in *Sonamzi's* case (*supra*) but also by numerous other decisions, see *Manyosine vs. Nonkanyezi,* 1 N.A.C. 114, at page 115, *Mapoloba vs. Mapoloba,* 2 N.A.C. 186, at page 188, *Mnyanyekwa vs. Macuba,* 4 N.A.C. 139, at page 140, *Mvana vs. Mvana,* 5 N.A.C. 200, at page 201, *Xatula vs. Xatula,* 5 N.A.C. 212, *Zibuti vs. Zibuti,* 6 N.A.C. 21, at page 22, *Mdoda vs. Toseni,* 6 N.A.C. 40, at page 41, and *Gqalana vs. Gqalana,* 1935 N.A.C. (C. & O) 51, at pages 53 and 54.

It is true that in *Rashula vs. Masixandu,* 5 N.A.C. 202, at page 203, it is laid down that the widow cannot claim to be placed in possession of the property left by her late husband and that that dictum is reiterated in *Sidubulekana vs. Somyalo,* 1931 N.A.C. (C. & O.) 12 and *Menziwa vs.* Gqati, 1934 N.A.C. (. & O), 83, at page 84. It would, however, appear from the context that what was intended by the dictum was to convey that the widow had no right to the control of her late husband's property as distinct from her right to have it remain at his kraal or at the kraal approved of by her guardian whilst she continued to reside thereat. In any event, this is the legal position.

It is also true that in *Myuyu vs. Nobanjwa,* 1947 N.A.C. (C. & O.) 66, at page 68, relied upon by Mr. Chisholm, it is stated that " no doubt a widow who has been left destitute has the right as a last resort to compel the heir by legal action to restore the estate property or some of it to her husband's kraal for her support (*Zibuti vs. Zibuti,* 6 N.A.C. 21) but so long as she is adequately maintained she has no right in so far as she herself is concerned, to interfere with the heir's rights ". But, with respect, that dictum loses sight of the widow's right in Bantu law and custom to have sufficient of her late husband's property remain at his kraal for her maintenance whilst she continues to reside thereat and to this extent it ought, therefore, not to be followed.

The reasons given by the plaintiff in his evidence for wanting to remove the stock from the deceased's kraal are that the Defendant sold one of his cattle and spent the proceeds without his permission and that she had stated that she intended transferring the stock into the name of her child born after the deceased's death. But, it is open to the Plaintiff, under Bantu law and custom, himself to move to the deceased's kraal or place a representative thereat to take over the custody of the stock and then exercise full control over it and prevent the Defendant from disposing of any of it without his consent, see *Mnyanyekwa's, Zibuti's and Gqalana's* cases (*supra*). It is also open to the Plaintiff to have the stock registered in his name in the dipping records which, he intimated in the course of his cross-examination, would suffice to protect his interests.

It follows that the Plaintiff has failed to show any special circumstances warranting a departure from the Defendant's customary right to have the stock remain at the deceased's kraal at which she resides and to be maintained thereby. That being so and as, according to the pleadings, evidence and grounds of appeal, the issue in dispute in the removal of the stock from that kraal, the Plaintiff did not make out a *prima facie* case and the Commissioner cannot be said to be wrong in decreeing absolution from the instance, with costs, at the close thereof.

I agree with the Commissioner that the Plaintiff's evidence that the stock in dispute included certain dowry which he had received for one of the deceased's daughters, does not advance his case as, according to the particulars of claim in the summons, he inherited from the deceased all the stock claimed and he is bound by his pleading. In any event the Defendant was, consonant with Bantu law and custom, entitled to be maintained from the stock received as dowry for her daugther after the deceased's death and to have this stock kept at the deceased's kraal regard being had to the fact that, as is implicit from the Plaintiff's evidence, she needed it for her support, see *Mvana's* case (*supra*). Admittedly, there is the dictum to the contrary in *Mayekiso vs. Mayekiso,* 1944 N.A.C. (C. & O.) 30, cited by Mr. Chisholm. But, with respect, the dictum in *Mvana's* case falls to be accepted as the correct one as it is in keeping with Bantu law and custom in that dowry stock accrues to the house to which the girl for whom the dowry was paid, belongs, both for inheritance and maintenance purposes.

In the result the appeal should be dismissed, with costs.

Yates and Potgieter, Members, concurred.

For Appellant: Mr. E. C. Chisholm of Umtata.

For Respondent: Mr. K. Muggleston of Umtata.

CENTRAL BANTU APPEAL COURT.

ALPHEUS MSOMI *vs.* **ELINA MSOMI.**

CASE No. 28 OF 1963.

JOHANNESBURG: 3rd December, 1963, before O'Connell, President, Gold and Oelschig, Members of the Court.

BANTU ESTATES.

Devolution of the estate of a Bantu who had contracted a marriage in which community of property is excluded by operation of law—Directive by Minister lacking—whether Succession Act, No. 13 *of* 1934, *is applicable.*

PRACTICE AND PROCEDURE.

Presiding Officers required to make minutes of proceedings—record should speak for itself.

Summary: Plaintiff is a widow. Her marriage to her deceased husband did not produce the legal consequences of a marriage in community of property. Three female children were born of the marriage. Her husband died intestate and the Bantu Affairs Commissioner, in his adminstrative capacity, declared Defendant, the deceased's brother, to be his heir. Plaintiff thereupon sued Defendant for an order declaring, *inter alia,* (*a*) that Plaintiff is the heir of deceased, alternatively, that the children of deceased are his heirs *ab intestato* and (*b*) that the deceased having been married by civil rites, Bantu law and custom did not apply to his estate.

Defendant filed a special plea, an exception and a plea. The exception was that the summons does not disclose a cause of action. The plea denied certain allegations in the summons and averred that the administrative declaration by the Bantu Affairs Commissioner of Defendant as the heir was correct in law.

Without hearing evidence or making any record of the proceedings, the judicial officer dismissed Defendant's special plea and exception and granted all Plaintiff's prayers.

Held: That, in the absence of a Ministerial direction in terms of Regulation 2 (*d*) of Government Notice No. 1664 of 1929, the estate of a Bantu who had during his lifetime contracted a marriage in which community of property is excluded by operation of section 22 (6) of Act No. 38 of 1927, as amended, devolves according to Bantu law and custom and the Succession Act, 1934, does not apply to the estate.

Held further: That the Court would accept the statement by the judicial officer in his reasons for judgment that he gave judgment after hearing arguments on all the pleadings, but this decision must not be construed as countenancing any departure from the requirements of Rule 55 of Bantu Affairs Commissioner's Courts.

Cases discussed:

Mokalane and Others versus Mokalane, 1957 *N.A.C.* 65.

Cases referred to:

Moshehla vs. Moshehla, 1952 N.A.C. 105.
Sikenkelane vs. Ngcukane, 1947 N.A.C. (C. and O.) 9.
Ex parte Minister of Native Affairs *in re Molefe vs. Molefe,* 1946 A.D. 315.

Legislation referred to:
Rules 55 and 56 (3) of Bantu Affairs Commissioner's Courts.
Section 22 (6) of Act No. 38 of 1927.
Paragraphs (*d*) and (*e*) of Government Notice No. 1664 of 1929.

Succession Act, 1934.

O'Connell, President (delivering the judgment of the Court):—

Good cause having been shown, the application for condonation of the late noting of appeal is granted.

Throughout the judgment the Appellant will be referred to as "the Defendant" and the Respondant as "the Plaintiff".

The Plaintiff married Phinley Msomi at Newcastle, Natal, on the 26th July, 1939. In terms of section 22 (6) of Act No. 38 of 1927, as amended, this marriage did not produce the legal consequences of a marriage in community of property. Of the marriage were born three female children. The marriage was terminated by the death of Phinley Msomi on the 26th April, 1959; he died intestate and the Bantu Affairs Commissioner, acting in an administrative capacity, declared the Defendant to be his heir. On the 15th March, 1963, the Plaintiff sued out a summons against the Defendant reading as follows:—

"1. The parties hereto are Natives as defined by Act No. 38 of 1927.

2. Plaintiff is the widow of the late Phinley Msomi, who died on the 26th April, 1959.

3. Plaintiff and the deceased were marriad to each other by civil rights with community of property excluded on the 26th July, 1939, and the said marriage subsisted until the death of the said Phinley Msomi.

4. There are three children born of the marriage being Thokozi aged 13 years, Sizagele aged 10 years and Ntomzoto aged 9 years and of whom the Plaintiff is the legal guardian since the death of her husband as aforesaid.

5. The deceased was a person who did not work and for the major part of the marriage was a drain on Plaintiff's resources. Plaintiff carried the burden of acquiring furniture, a dwelling and all requisites for the family and household. By reason of the status of the parties the assets were aquired in the name of the late Phinley Msomi, although to all intents and purposes as between the parties Plaintiff did in fact acquire the said assets.

6. By reason of the said premises Plaintiff states that the said assets are her sole property, or alternatively, that the said assets vest in a universitas subsisting between Plaintiff and the deceased.

7. The total assets acquired during the subsistence of the marriage including the rights of tenancy and occupation of the premises situate at Stand 1409, Mofolo North, are valued at less than R1,200.

8. The Bantu Affairs Commissioner, Johannesburg, acting in an administrative capacity has declared the Defendant to be the heir to the estate of the late Phinley Msomi and which includes the assets and rights aforementioned. Plaintiff disputes that the Defendant is the heir.

Wherefor Plaintiff claims an Order declaring—

(*a*) That the estate of the late Phinley Msomi vests in a universitas subsisting between the deceased and Plaintiff, alternatively, that the Plaintiff is the owner thereof in fact;

(*b*) That the Plaitiff is the intestate heir of the deceased, alternatively, that the children of the deceased are the heirs *ab intestato* to the said estate;

(*c*) That the deceased was married by civil rights and the laws of succession by Native Law and Custom do not apply to the said estate;

(*d*) That the estate of the deceased does not devolve on in the Defendant;

(*e*) Alternative relief;

(*f*) Costs of Suit."

The Defendant entered appearance to defend the action and filed the following special plea, exception and plea:—

Defendant's Special Plea.

"Defendant states that the Plaintiff should have joined the Bantu Affairs Commissioner of Johannesburg as joint Defendant in the above action and because of the said non-joinder of the Bantu Affairs Commissioner, the Defendant objects to the summons and proceedings thereunder and states that the above Honourable Court has no jurisdiction to adjudicate herein.

Wherefor Defendant prays that Plaintiff's claim be dismissed with costs.

Defendant's Exception.

Defendant excepts to the Plaintiff's summons as being vague and embarrassing, alternatively bad in law, in that the allegations contained in paragraphs 5, 6, 8 (*a*), 8 (*b*), 8 (*c*) and (*d*) are incorrect in law, and the Plaintiff's summons does not disclose a cause of action.

Wherefor Defendant prays that Plaintiff's claims be dismissed with costs.

Defendant's Plea.

In the event of the Defendant's Exception being dismissed and only in such event, then Defendant pleads to the Plaintiff's summons as follows:—

Ad paragraph 1.—The Defendant denies that the parties to the action are Natives as defined by Act No. 38 of 1927. Defendant states that the Bantu Affairs Commissioner of Johannesburg should have been joined in the acting as joint Defendant. Defendant states that the above Honourable Court does not have jurisdiction to hear this matter as the parties to it are not all Natives.

Ad paragraph 2.—Defendant admits this paragraph.

Ad paragraph 3.—Defendant has no knowledge of the contents hereof, does not admit same and puts Plaintiff to the proof thereof.

Ad paragraph 4.—Defendant admits this paragraph.

Ad paragraph 5.—Defendant has no knowledge of the contents hereof, does not admit same and puts Plaintiff to the proof thereof.

Ad paragraph 6.—Defendant denies this paragraph as if specifically traversed. Defendant states that the assets of the late Phinley Msomi on his death vested in the Defendant, his sole heir according to Native Law and Custom which apply to this case.

Ad paragraph 7.—Defendant has no knowledge of the contents hereof, does not admit same and puts the Plaintiff to the proof thereof.

Ad paragraph 8.—Defendant admits that the Bantu Affairs Commissioner of Johannesburg declared Defendant heir to the estate of the late Phinley Msomi and Defendant states that such declaration was correct in law. Wherefor Defendant prays that the Plaintiff's claim be dismissed with costs".

The exception was set down by the Defendant for hearing on the 24th April, 1963, but by consent the hearing was postponed to the 8th May, 1963, and then to the 22nd May, 1963. On the 10th May, 1963, the Plaintiff set down the action itself for hearing on the 22nd May, 1963.

There are no minutes of record of the proceedings after this but from entries on the record cover it would appear that a further postponement was granted to the 5th June, 1963, when judgment was reserved until the 26th June, 1963, on which date the following judgment was delivered:—

"Defendant's special plea and exception dismissed. Plaintiff on the prayer for declaration of rights is declared the sole heiress to the estate of the late Phinley Msomi and claims as prayed for in summons are allowed with costs".

Against this judgment the Defendant has noted an appeal. His notice of appeal reads:—

"Be pleased to take notice that the Appellant hereby notes an appeal to the above Honourable Court against the whole judgment of the Bantu Affairs Commissioner in favour of the Respondent in the above matter on the following grounds:—

(1) The Court was at the stage of the proceedings reached only called upon to adjudicate on the Appellant's exception to the Respondent's summons and on the Appellant's Special Plea, but the Bantu Affairs Commissioner, without hearing evidence, erred in considering the merits of the case and in giving a final judgment when he should only have pronounced on the Appellant's exception to the Respondent's Summons and on the Appellant's Special Plea.

Alternatively.

(2) The Bantu Affairs Commissioner erred in law and in one or more or all of the following ways:—

(*a*) In that he held that Native Law and custom did not apply to the case when he could have held that Native Law and custom did so apply.

(*b*) In that he erred in misinterpreting section 2 of the Regulations framed under the provisions of sub-section 10 of section *twenty-three* of Act 38 of 1927.

(*c*) In that he erred in refusing to follow the decisions in the cases of *Mahanti Sikenkelana vs. Mongezi Mgcukana* 1947 N.A.C. 9 (C and O) and *Shata vs. Shata,* 1942 N.A.C. (C and O) 42.

(*d*) In that he erred in holding that Respondent's marriage fell within the purview of section 2 of the Regulations.

(*e*) In that he erred in not following the case of *Magqabi vs. Magqabi,* 1955 2 S.A. 428 A.D. when he should have followed this case."

In view of the peremptory provisions of Rule 55 of the Rules of Court, it is not understood why the judicial officer failed to make minutes of record of the proceedings. Had the minutes been made, the dispute as to whether the proceedings in the Court *a quo* were confined to argument on the exception and special plea or included argument on all the pleadings would not have arisen. In his reasons for judgment, the judicial officer states he entered judgment after hearing argument on all the pleadings. Though he does not say so, he presumably acted in terms of Rule 56 (3) of the Rules of Court because he states no evidence was tendered. This Court will accept his statement but this decision must not be construed as in any way countenacting a departure from the rule. The record should speak for itself and there should be no need to obtain information from other sources to ascertain what has occurred during the proceedings.

In the light of the foregoing, the first ground of appeal fails.

The judicial officer says he reached the conclusion he did because he was "of the opinion that the decision of the Native Appeal Court in the case of *Mokelane and Others vs. Mokalane,* 1957 *N.A.C.* 65 should be followed and not the decision in the case of *Moshehla vs. Moshehla,* 1952 *N.A.C.* 105" because it is "a more recent case than the case of *Sikenkelane vs. Ngcukane,* 1947 *N.A.C. (C and O)* 9, which was decided a few months before the promulgation of the amending Government Notice No. 939 of 1947, and the case of *Moshehla vs Moshehla* (*supra*)".

The question for decision in *Mokalane's* case was how the estate of a deceased Native who had during his lifetime contracted first a marriage in community of property and later a subsequent marriage from which community of property was excluded under the provisions of section *twenty-two* (6) of the Native Administration Act, 1927, should devolve. The Court correctly, with respect, held that the estate had to devolve according to common law and that, in terms of the Succession Act, the Defendant became rightly the sole heiress. In delivering the judgment of the Court, *Menge, Permanent Member,* (as he then was) is reported as saying:—

> "Mr. Lubinsky's second submission was that the marriage between the deceased and the Defendant which excluded community of property under section *twenty-two* (6) of the Act was also not a marriage out of community of property but a marriage *sui generis* and foreign to the common law. If this is correct then the Defendant could not have been the sole heiress because the Succession Act (No. 13 of 1934), which secures the heritable rights of a surviving spouse as regards the first £600 and which deals only with marriages in or out of community of property, would have no applica-

tion. Mr. Lubinsky cited the case of *ex parte Minister* of *Native Affairs in* re *Molefe vs. Molefe,* 1946 A.D. 315. But this case so far from supporting Mr. Lubinsky's argument is directly against him. In the course of his judgment the Chief Justice said (at page 320) 'If a marriage does not introduce community of property between spouses such marriage is necessarily in the absence of special legislative provision, a marriage out of community of property'. On the strength of these remarks, the following appears in the headnote to the report:—

> "*Held further:* A marriage from which community of property is excluded in terms of section *twenty-two* (six) of the Act. is a marriage out of community of property for the purposes of the Succession Act, 1934".

Not only are the remarks quoted purely *obiter* but the conclusion reached, as appearing in the headnote, is too widely stated and it is misleading. The conclusion is reached by ignoring completely the existence of the special provisions made by the legislature for the devolution of intestate estates of Natives. The Succession Act, 1934, must be read subject to those special provisions which are contained in the regulations published under Government Notice No. 1664 of 1929, as amended. Where the regulations are in conflict with the Common Law as amended by the Succession Act, the Act will not apply, but where the regulations are not in conflict then the Act will apply. It is clear from Regulation 2 (*e*) that, in the absence of a Ministerial directive in terms of Regulation 2 (*d*), the estate of a Native who had contracted a marriage in which community of property is excluded by operation of section 22 (6) of Act No. 38 of 1927, as amended, should devolve according to Native law and custom. The Succession Act would not apply in such a case. It would only apply in an intestate Native estate where the Minister has, in terms of Regulation 2 (*d*), directed that the property shall devolve as if the Native had been a European.

In this case, there has been no Ministerial directive in terms of Regulation 2 (*d*) and the estate of the late Phinley Msomi must devolve according to Native Law and custom. The judicial officer therefore erred in holding that the Common Law should apply and that the estate should devolve according to Common Law in terms of the Succession Act of 1934, as amended.

The appeal is upheld, with costs, and the judgment of the Court *a quo* is altered to read "Absolution from the instance, with costs."

For Appellant: Mr. H. Heiman.

For Respondent: Adv. N. H. Katz I/b. D. L. Levisohn.